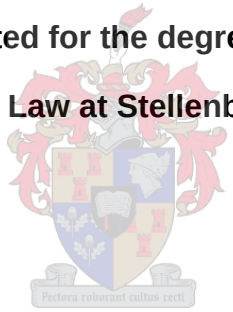
Water as a human right under international human rights law: Implications for the privatisation of water services

By

Khulekani Moyo

Dissertation presented for the degree of Doctor of Laws

in the Faculty of Law at Stellenbosch University



Supervisor: Professor Sandra Liebenberg

March 2013

Declaration

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am sole author thereof (save to the extent explicitly otherwise stated), that reproduction and publication thereof by Stellenbosch University will not infringe any third party rights and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Khulekani Moyo, 30th November 2012, Stellenbosch

Summary

The worsening scarcity of fresh water resources has led to an increasing number of people without sustainable access to safe water across the globe. Water privatisation has been presented as the panacea to addressing the global water crisis. Privatisation of water has heightened the impetus for the explicit recognition of water as a human right. This dissertation seeks to establish the legal status of the right to water under international human rights law. The dissertation further attempts to ascertain the scope and normative content of such a right. In order to answer these questions, this dissertation carries out a detailed analysis of the possible legal basis, scope and normative content of the right to water under international human rights law. The principal question that arises is how a State can ensure compliance with its human rights obligations in the event of involvement of non-State actors such as private corporations in the management and distribution of water services. This dissertation's main hypothesis is that although privatisation of water services does not relieve the State of its legal responsibility under international human rights law, such privatisation imposes certain obligations on private actors consistent with the right to water. The dissertation goes beyond articulating normative considerations and looks at implementation at the national level by highlighting good practices on the practical implementation of the right to water consistent with the normative standards imposed by the right. The dissertation's key contribution is its development of an accountability model to ensure that States and private actors involved in the provision of water services have clearly designated roles and responsibilities consistent with the human right to water. If properly implemented, the model has the potential to give greater specification to the normative commitments imposed by the right to water in privatisation scenarios.

Opsomming

Die verergerende skaarste van vars water bronne het aanleiding gegee tot die toename in die hoeveelheid mense sonder volhoubare toegang tot veilige water oor die hele aarde. Dit word aangevoer dat die privatisering van water die wondermiddel is om die globale water krisis aan te spreek. Die privatisering van water het aanleiding gegee tot ‘n verskerpte aandrang om water uitdruklik te erken as ‘n mensereg. Hierdie proefskrif poog om die regsstatus van die reg tot water te vestig binne die raamwerk van internasionale menseregte. Die proefskrif probeer verder om vas te stel wat die omvang en normatiewe inhoud van so ‘n reg sal wees. Vervolgens voltrek hierdie proefskrif ‘n uitvoerige analise van die moontlike regsbasis, omvang en normatiewe inhoud van die reg tot water binne die raamwerk van internasionale menseregte. Die vernaamste vraag wat opduik is hoe ‘n Staat kan verseker dat sy menseregte verpligtinge nagekom word waar nie-Regeringsrolspelers soos korporasies betrokke is by die bestuur en distribusie van waterdienste. Die kern hipotese van hierdie proefskrif is dat alhoewel die privatisering van waterdienste nie die Staat verlig van sy regsverpligtinge in terme van internasionale menseregte nie, sodanige privatisering sekere verpligtinge aan privaatrolspelers voorskryf wat in lyn is met die reg op water. Hierdie proefskrif gaan verder as die artikulering van normatiewe oorwegings en kyk ook na die implementering op nasionale vlak deur goeie praktyke uit te lig met betrekking tot die prakiese implementering van die reg tot water wat konsekwent is met die normatiewe standaarde wat die reg voorskryf. Die kern bydrae van hierdie proefskrif is die ontwikkeling van ‘n aanspreeklikheismodel wat versker dat Regerings en privaat rolspelers wat betrokke is by die voorsiening van waterdienste duidelik aangewysde funksies en verantwoordelikhede het wat in lyn is met die reg tot water. Indien hierdie model behoorlik implementeer word, het dit die potensiaal om grooter spesifikasie te gee aan die normatiewe verpligtinge wat deur die reg tot water voorgeskryf word in privatiserings scenarios.

Acknowledgements

I wish to express my profound appreciation and thanks to my supervisor, Professor Sandra Liebenberg who painstakingly read drafts of this work with admirable patience. Her careful guidance, mentorship, constructive comments and many years of encouragement and support were invaluable in the completion of my doctoral dissertation. I am particularly grateful to Stellenbosch University's postgraduate "Hope" Project initiative of the Law Faculty and the Claude Leon Foundation for the considerable institutional support and funding that made my doctoral research possible. I would like to acknowledge the support of the Beit Trust, the Institute for Human Rights, Abo Akademi University and the Finnish Ministry of Foreign Affairs for providing me with the funding to conduct my research in Finland between August and September 2010.

I would also like to thank the Academy of Global Governance for enabling me to attend the Executive Seminar on "Global Governance and Transnational Human Rights" as well as the doctoral school at the Robert Schuman Centre for Advanced Studies, European University Institute where I had an opportunity to present aspects of my doctoral research. Many thanks to the participants at the Law and Poverty Colloquium held at the Stellenbosch Institute for Advanced Legal Studies from 29-31st May 2011 for their insightful comments on a paper which formed part of my doctoral research. My research benefited tremendously from the incisive suggestions and the collegiality of my colleagues in the Overarching Strategic Research and Outreach Project on *Combating Poverty, Homelessness and Socio-Economic Vulnerability under the Constitution* and thereafter the *Socio-Economic Rights and Administrative Project* at Stellenbosch University's Faculty of Law. I owe special thanks and gratitude to Malcolm Langford for identifying and nurturing my research potential.

Over the years it has taken to complete my doctoral research, I have benefited greatly from the support and encouragement of my family and friends. My wife Cecilia Nedziwe-Moyo merits special mention for her immeasurable support, understanding and encouragement throughout the research and her support in countless other ways.

Abbreviations

ANC	African National Congress
BOT	Build-Operate-Transfer
DAWASA	Dar es Salaam Water and Sewerage Authority
DBSA	Development Bank of South Africa
CALS	Centre for Applied Legal Studies
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDHA	Centre for Human Rights and Environment
CERD	Committee on the Elimination of Racial Discrimination
CRC	Convention on the Rights of the Child
CESCR	Committee on Economic, Social and Cultural Rights
CKGR	Central Kalahari Game Reserve
COHRE	Centre on Housing Rights and Evictions
CPUC	California Public Utilities Commission
DBSA	Development Bank of South Africa
DRC	Democratic Republic of Congo
ECCHR	European Centre for Constitutional and Human Rights
ECHR	Convention on the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EITI	Extractive Industry Transparency Initiative
ERRC	European Roma Rights Centre
EWURA	Energy and Water Utilities Regulatory Authority
FSC	Forestry Stewardship Council
GEAR	Growth, Employment and Redistribution Program

GNUC	Greater Nelspruit Utility Company
GRI	Global Reporting Initiative
HIPC	Highly Indebted Poor Countries
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	Independent Competition and Regulatory Commission
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IFC	International Finance Corporation
IFIs	International Financial Institutions
IGOs	Inter-Governmental Organisations
ILO	International Labour Organisation
IMF	International Monetary Fund
ISO	International Organisation for Standardisation
KPCS	Kimberley Process Certification Scheme
MDGs	Millennium Development Goals
MNCs	Multinational Corporations
MPIA	Metro Pacific Investments Corporation
MWSS-RO	Metropolitan Waterworks and Sewerage System - Regulatory Office
NAWAPO	National Water Policy
NCHR	Norwegian Centre for Human Rights
NCP	National Contact Point
NGO	Non-Governmental Organisation
OECD	Organisation on Economic Corporation and Development
PPPs	Public-Private Partnerships
RDP	Reconstruction and Development Plan

SCA	Supreme Court of Appeal
SEMAPA	Sewage Service of Cochabamba
SERAC	Social and Economic Rights Action Centre
TNCs	Transnational Corporations
UDHR	Universal Declaration of Human Rights
UGF	Uzbek-German Forum
UK	United Kingdom
UN	United Nations
UNCE	UN Commission in Europe
UNCITRAL	UN Commission on International Trade Law
UNDP	United Nations Development Programme
UNECE	United Nations Commission for Europe
UNICEF	United Nations Children's Fund
USA	United States of America
WHO	World Health Organisation
WSSA	Water and Sanitation Services South Africa
WTO	World Trade Organisation

Table of Contents

Chapter 1

Introduction

1 1 Background to the study

Access to safe water is essential to sustain human life and indispensable to ensure a healthy and dignified life.[1] A significant portion of the world's population lacks basic access to safe water which leads to a substantial global burden of disease and death from water-related diseases. Lack of access to safe water has been tied to sixty per cent of the world's illnesses.[2] Furthermore, lack of access to safe water has been considered as one of the greatest obstacles to development.[3] The latest official figures published by the World Health Organisation (hereinafter referred to as "WHO") and the United Nations Children's Fund (hereinafter referred to as "UNICEF") indicate that 894 million people lack access to safe water for domestic use.[4] The WHO and UNICEF report further estimates that globally, 88 per cent of diarrhoeal deaths are due to inadequate availability of water for hygienic purposes.[5]

Water related diseases are some of the leading causes of death in developing countries. Water-borne diseases such as cholera, typhoid and diarrhoea are associated with lack of access to safe water. For instance, the largest ever recorded cholera outbreak in Zimbabwe in mid-August 2008 left a staggering 98 592 cases including 4 288 deaths by the 30th July 2009.[6] According to the United Nations

---

[1] T Kiefer & V Roaf "The Human Right to Water and Sanitation-Benefits and Limitations" in M Mancisidor (ed) *The Human Right to Water – Current Situation and Future Challenges* (2005) 1 4; EB Bluemel "Implications of Formulating Human Right to Water" 2004 (31) *Ecology Law Quarterly* 957 957; M Williams "Privatisation and the Human Right to Water: Challenges for the New Century" (2006-2007) 28 *Michigan Journal of International Law* 469 469-470. As noted by the Harvard Law Review, "the impact of water's increasing scarcity has grown more pronounced in recent decades, and so too has its importance in the public consciousness." See Harvard Law Review "What Price for the Priceless?: Implementing the Justiciability of the Right to Water" (2007) 20 *Harvard Law Review* 1067 1068. Screiber also notes that "water is a fundamental aspect of human development, dignity and health. See W Screiber "Realising the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations" 2008 (48) *National Resources Journal* 431 431.

[2] V Petrova "At the Frontiers of the Rush for Blue Gold: Water Privatisation and the Human Right to Water" 2006 (31) *Brooklyn Journal of International Law* 557 580.

[3] Harvard Law Review "What Price for the Priceless?: Implementing the Justiciability of the Right to Water" (2007) 20 *Harvard Law Review* 1067 1071.

[4] See World Health Organisation & United Nations Children's Fund *Progress on Sanitation and Drinking Water* (2010) 7.

[5] 7. The UN General Assembly, in a watershed resolution adopted in 2010 on the right to water and sanitation, graphically illustrates the dire magnitude of the global water crisis. See preamble to the UN General Assembly *The Human Right to Water and Sanitation* (2010) A/64/L.63/Rev.1 and Add.1 para 4.

[6] See World Health Organisation *Cholera Country Profile: Zimbabwe* (2009) 6.

(hereinafter referred to as "UN") Human Rights Council, approximately 1.5 million children under 5 years of age die as a result of water-related diseases.[7]

Lack of access to water also has an enormous impact on human development. Water is a multi-purpose resource that is used not only for personal, domestic as well as for industrial and agricultural use,[8] but it is also essential for food security, economic development, and for securing livelihoods.[9] In addition to the more apparent consequences that result from lack of access to an adequate supply of safe water highlighted above, there are secondary, less apparent effects. These include reduced school attendance, as well as the negative impact on the ability of communities or individuals to earn a living through subsistence farming or other water-dependent livelihoods.[10] Lack of access to safe water in the vicinity of the home has particular impact on women and children. Many children, especially girls, spend their days carrying water from distant sources rather than going to school, which has a negative impact on their enjoyment of the right to an education. The UN has estimated that 443 million school days are lost every year as a result of water-related diseases.[11]

It is further important to note that the linkage between poverty and water shortage is well established. Those who do not have access to sufficient water are geographically located in the poorer regions of the developing world.[12] Rural women, especially in developing countries, lack time for income-generating activities as they have to walk long distances to access water sources as well as attending to those suffering from water related diseases.[13] The UN's 2009 World Water Report points out that in Sub-Saharan Africa, the percentage of people living in absolute poverty is

[7] See preamble to the UN Human Rights Council *Human Rights and Access to Safe Drinking Water and Sanitation* (2010) UN Doc A/HRC/15/L.14 para 6.
[8] IT Winkler *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (2012) 1. See also LK Nkonya "Realising the Human Right to Water in Tanzania" (2010) 17 *Human Rights Brief* 25 25.
[9] 2.
[10] A Hardberger "Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates" (2005) 4 *Northwestern Journal of International Human Rights* 311 312.
[11] See preamble to the UN Human Rights Council *Human Rights and Access to Safe Drinking Water and Sanitation* (2010) UN Doc A/HRC/15/L.14 para 6.
[12] SMA Salman & S McInerny-Lankford *The Human Right to Water: Legal and Policy Dimensions* (2004) vii.
[13] Williams 2006-2007 *Michigan Journal of International Law* 471.

essentially the same as it was 25 years ago. The report further states that 340 million Africans lack access to safe drinking water.[14]

The above figures could be higher as the indicator used for these figures is access to an improved water source yet criteria such as safety and affordability of the water service are not considered.[15] Marginalised and poor communities may not afford the water service; water services may be inaccessible with communities spending inordinately long time waiting to access a water source. Affordability of water services has an enormous impact on the quantities of water consumed, alongside other factors such as physical accessibility and water quality. Even improved water sources such as wells and boreholes may not supply water services regularly or the water may be contaminated.

The global water crisis has become a topical issue, generating complex and extensive debates within the UN and other international foras.[16] The need for a global consensus to combat the water crisis is addressed in the eight Millennium Development Goals (hereinafter referred to as "MDGs") adopted by world leaders at the turn of the century.[17] One of the set targets is to reduce by half the proportion of people without sustainable access to safe water by 2015.[18] Even the ambitiously worded MDGs call for a reduction of only 50 per cent in the number of people without sustainable access to water.[19] Access to safe water is also important for the realisation of related socio-economic rights such as health, education and poverty eradication.[20]

The global water crisis highlighted above has resulted in calls for the treatment of water as an economic good.[21] The notion of regarding water as an economic good implies that all water services are based on the principle of full cost recovery.[22] The principle of full cost recovery seeks the recovery of all costs related to the provision

[14] World Water Assessment Programme/UNESCO *The United Nations World Water Development Report 3: Water in a Changing World* (2009) xii <http://www.unesco.org/water/wwap/wwdr/wwdr3/> (accessed 23.09.2010).
[15] Winkler *The Human Right to Water* 2.
[16] Salman & McInerny-Lankford *The Human Right to Water* vii.
[17] Target 10 of goal 7 is to "halve the proportion of people without sustainable access to safe drinking water" UN Millennium Development Goals (2000) <http://www.un.org/millenniumgoals/> (accessed 12.03.2010).
[18] See Target 10 of goal 7 of the MDGs.
[19] K Bakker *Privatising Water: Governance Failure and the World's Urban Water Crisis* (2010) 9.
[20] Winkler *The Human Right to Water* 6.
[21] See K Moyo "Privatisation of the Commons: Water as a Right; Water as a Commodity" (2011) 22 *Stellenbosch Law Review* 804 804.
[22] See Bluemel 2004 *Ecology Law Quarterly* 964.

of water, primarily operationalised through the pricing of water.[23] It is significant that the conceptualisation of water as an economic good, and full cost recovery as its corollary, opened up the water sector to privatisation.[24] The global water scarcity is depicted as justifying the privatisation of water and the adoption of cost-reflective pricing.[25] This is predicated on the argument that water is a scarce resource which must be priced at full economic cost. This will enable further investments in water services to facilitate access to the unserved and underserved individuals and communities.[26]

The world water crisis saw the International Financial Institutions (hereinafter referred to as "IFIs"), in collaboration with donor agencies and regional development banks, vigorously pushing for privatisation of water supply services.[27] The World Bank, the International Monetary Fund (hereinafter referred to as the "IMF") and regional development banks, particularly in the mid-1990s, started to push for privatisation of water supply services. These institutions promoted the involvement of multinational water corporations in particular as the panacea to the global water crisis.[28] The private sector was viewed as bringing much-needed financing, efficiency, management skills and technology to the water services sector.[29] Water privatisation therefore became the centrepiece of the IFIs, so-called water think tanks and donor agencies' policies in the water sector.[30] The insistence on water privatisation was based on perceived State inefficiency.[31] For instance, in 1997, the

[23] 964.
[24] See section 3 2, chapter 3 for further discussion on privatisation.
[25] See K Bakker "The 'Commons' versus the 'Commodity': Alter-globalization, Anti-privatization and the Human Right to Water in the Global South" (2007) 39 *Antipode* 431 435.
[26] World Bank *The State in a Changing World: World Development Report* (1997) 64.
[27] See P Bond "Water Commodification and Decommodification Narratives: Pricing, Policy Debates from Johannesburg to Kyoto to Cancun and back" 2004 (15) *Capitalism Nature Socialism* 7 8.
[28] See Petrova 2006 *Brooklyn Journal International Law* 578-580; K Bakker "The 'Commons' versus the 'Commodity': Alter-globalization, Anti-privatization and the Human Right to Water in the Global South" 2007 (39) *Antipode* 430 431; Williams 2006-2007 *Michigan Journal of International Law* 46. Petrova points out that water services privatisation has been consolidated within the stewardship of a few water multinational companies, particularly from France and UK, and lately Germany. See Petrova 2006 *Brooklyn Journal of International Law* 578.
[29] See L Lundqvist "Privatisation: Towards a Concept for Comparative Policy Analysis" 1988 (8) *Journal of Public Policy* 1 7. See also P Parker "The New Right, State Ownership and Privatisation: A Critique" (1995) 8 *Economic and Industrial Democracy* 349-378 who argues that arguments about privatisation improving service performance and public finances remain uncorroborated as privatisation may run counter to what its proponents claim. The author cites the privatisation of the British Council housing as well as the privatisation of the public transport in Britain as a case in point.
[30] S Grusky & M Fiil-Flynn *Will World Bank Back Down*? (2004)1.
[31] The World Bank pointed to what it perceived as flawed management by the State and structural defects in public sector management of water as being responsible for the poor quality and low

IMF, the World Bank and the Inter-American Development Bank demanded the privatisation of Bolivia's water utility, the *Servicio Municipal del Agua Potable y Alcantarillado* (hereinafter referred to as "SEMAPA") as a condition for debt renegotiation and forgiveness.[32] Bolivia complied with these structural adjustment conditionalities by forging ahead with the privatisation of SEMAPA.[33] In Tanzania, the country obtained funding of US$140m from the World Bank, African Development Bank and European Investment Bank for a comprehensive programme to repair and extend Dar es Salaam's water and sewerage infrastructure. The funding was conditional on having a private operator replacing the public water provider.[34] It is against this backdrop that proponents of water privatisation look to private sector involvement in water service supply as a way to improve access to safe water especially in cash-strapped developing countries.[35] The above and other related water privatisation cases are discussed and analysed in chapter 3.[36]

The conception of water as an economic good also stimulated the lobby for the explicit recognition of water as a human right. Human rights practitioners argued that water is a basic need, a human right and a public good hence its commodification[37] would lead to lack of access, especially by poor and vulnerable members of society.[38] Additionally, a human right to water would guarantee access to safe and affordable water in sufficient quantities without discrimination and would

---

penetration of water supply systems. See World Bank *The State in a Changing World: World Development Report* (1997) 64.

[32] T Cruise & C Ramos "Water and Privatisation: Doubtful Benefits, Concrete Threats" *Social Watch Report: The Poor and the Market* (2003) 98 <http://www.philadelphia.edu.jo/Books> (accessed on 17.06.2011).

[33] EP Beltrán *Water, Privatisation and Conflict: Women from the Cochabamba Valley* (2004) iv <http://www.boell.org> (accessed 16.06.2011). In 1997, the World Bank provided Bolivia with US$20 million in technical assistance for regulatory reform and privatisation, including preparation of laws and regulations for the financial, infrastructure and business sectors. Some of this funding was earmarked for the "Major Cities Water and Sewerage Rehabilitation Project" which aimed to provide full coverage to Santa Cruz, Cochabamba and La Paz. One of the bank's conditions for the extension of the loan was the privatisation of the La Paz and Cochabamba water and sewerage utilities.

[34] See a discussion paper by J Perez "Sleeping Lions: International Investment Treaties, State-Investor Disputes and Access to Food, Land and Water" *Oxfam Discussion Paper* (2011) 19-20 <http://www.oxfam.org> (accessed 08.06.2011).

[35] Petrova 2006 Brooklyn Journal International Law 581-582.

[36] See 3 5, chapter 3 for a discussion of the impact of privatisation on water services focusing on four case studies.

[37] Commodification is the process of converting a good or service formerly subject to many non-market social rules into one that is primarily subject to market rules. See R Giullianotti "Supporters, Followers, Fans and Flaneurs: A Taxonomy of Spectator Identities in Football" (2002) 26 *Journal of Sport and Social Issues* 25 26.

[38] Shiva *Privatisation, Pollution and Profit* ix.

enjoin the State to act to ensure access.[39] A human rights based approach, it was argued, would transform the basic need for water into a right that gives rise to corresponding obligations.

1 2 Research problem

The UN Committee on Economic, Social and Cultural Rights (hereinafter referred to as "CESCR") declared the existence of the right to water in the ground-breaking General Comment 15 adopted in 2002.[40] A watershed development occurred in 2010 when the UN General Assembly adopted a resolution on the right to water and sanitation.[41] This was affirmed by the UN Human Rights Council in 2010 when it stated that the right to safe drinking water is derived from the right to an adequate standard of living, the right to health, as well as the right to life and human dignity.[42]

Although the CESCR attempted to elaborate the legal basis, scope and content of the right to water in General Comment 15, the legal status of the right to water under international human rights law remains the subject of intense debate as the right is not explicitly provided for under international human rights law. The resolutions and general comments adopted by UN institutions are a very significant political step towards the recognition of the right to water. However, from a legal perspective many questions remain as to the legal status of the human right to water under international human rights law.[43]

The two major international human rights treaties, the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR")[44] and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred

[39] See CESCR *General Comment 15* (2002) para 2.
[40] See UN Committee on Economic, Social and Cultural Rights *General Comment No 15, Right to Water* (2002) UN Doc E/C.12/2002/11. It is noteworthy that although General Comment 15 is not itself legally binding, it is an authoritative interpretation of the provisions of the ICESCR, which is legally binding on States that have ratified or acceded to it. General comments are used by the Committee on Economic Social and Cultural Rights (CESCR) to elaborate on the normative content and nature of the obligations imposed by the International Covenant on Economic, Social and Cultural Rights (ICESCR). See M Craven "The Committee on Economic Social and Cultural Rights" in A Eide et al (eds) *Economic, Social and Cultural Rights: A Textbook,* (2001) 455-457 for a discussion of the legal status of General Comments.
[41] UN General Assembly *The Human Right to Water and Sanitation* UN Doc A/Res/64/292.
[42] UN Human Rights Council *Human Rights and Access to Safe Drinking Water and Sanitation* (2010) UN Doc A/HRC/res/15/9 para 1.
[43] IT Winkler The Human Right to Water: Significance Legal Status and Implications for Water Allocation (2012) 11.
[44] International Covenant on Civil and Political Rights (1966) UN Doc A/6316 (hereafter "ICCPR").

to as "ICESCR")[45] do not explicitly refer to a right to water.[46] As a human right to water has an important role to play in addressing the global water crisis described above, the absence of a formal recognition of the right remains a cause for concern.

Privatisation processes covering human rights sensitive areas such as water inevitably involve a private operator in actions that impact on human rights. The privatisation movement in the water sector has generated immense debate, linked to the status of water as a human right on one hand, and the characterisation of water as an economic good on the other.[47] Weaker accountability mechanisms for human rights protection, particularly where non-State actors are involved in the provision of water services, raises human rights concerns.[48] In addition, accountability is further eroded by the paucity of direct international human rights obligations on non-State actors.

One of the fundamental issues engendered by privatisation[49] is the prevalence of non-State actor involvement in the provision of basic social goods such as water. The increase in privatisation entails that access to basic services such as water, health and education are increasingly dependent on the actions and policies of private service providers.[50] The traditional approach maintains that the protection of human rights remains exclusively the responsibility of States regardless of private involvement in human rights sensitive goods and services.[51]

Recent experiences have demonstrated that private actors can, and often do, abuse human rights of groups and individuals.[52] Feminist and children's rights scholars have highlighted the limitations of the State-centric approach to human rights, arguing that women and children's rights are particularly susceptible to

---

[45] International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316 (hereafter "ICESCR").

[46] See A Cahill "The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water" (2005) 9 *The International Journal of Human Rights* 389 390. See also A Kok "Privatisation and the Right of Access to Water" in K De Feyter & FG Gomez (eds) *Privatisation and Human Rights in the Age of Globalisation* (2005) 259 260; M Williams "Privatisation and the Human Right to Water: Challenges for the New Century" (2006-2007) 28 *Michigan Journal of International Law* 467 473.

[47] JW de Visser & C Mbazira *Comparing Water Delivery in South Africa and the Netherlands* (2006) 1.

[48] See section 3 5, chapter 3 where I discuss four select examples of water privatisation from Tanzania, Bolivia, The Philippines and South Africa.

[49] See chapter 3 below.

[50] See P Bond, D McDonald & G Ruiters "Water Privatisation in Southern Africa: The State of the Debate" (2003) 4 *Economic and Social Rights Review* 1 10.

[51] DM Chirwa "The Doctrine of State Responsibility as a Potential means of holding Private Actors Accountable for Human Rights" (2004) 5 *Melbourne Journal of International Law* 1 3.

[52] See Chirwa 2004 *Melbourne Journal of International Law* 3.

infringement by non-State actors in private relations.[53] Where host States may be weak or otherwise unable or unwilling to regulate private providers, it is important that the human rights regime should impose certain human rights duties on non-State actors. Thus, the challenge that this dissertation seeks to address is twofold as both the human right to water and human rights responsibilities of non-State actors such as corporations are relatively nascent and still contested notions which need further elaboration.

1 3 Research questions and hypotheses

In this dissertation, I analyse water privatisation from a human rights perspective, in particular the right to water as provided for under international human rights instruments and elaborated by treaty bodies and domestic legal systems. The key research question this dissertation attempts to answer is how a State can ensure compliance with its human rights obligations in the event of involvement of non-State actors in the management and distribution of water services. The dissertation's main hypothesis is that although privatisation of water services does not relieve the State of its legal responsibility under international human rights law, such privatisation imposes certain obligations on non-State actors consistent with the right to water. This will necessitate an analysis of the nature and scope of obligations which the right to water imposes on States and non-State actors.

The aim of Chapter 2 is to trace the possible legal basis of the right to water under international human rights law. The research questions explored in this chapter is how can a right to water be derived under international human rights law, and what is the content and scope of such a right? In order to answer these questions, the dissertation carries out a detailed analysis of the possible legal basis, scope and normative content of the right to water under international human rights law. The hypothesis is that an independent human right to water has evolved under international human rights law.

The question that chapter 3 seeks to address is to ascertain what impact privatisation of water services has on access and enjoyment of the human right to

[53] See for instance C Romany "State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in Human Rights Law" in R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 85 95. See also Chirwa 2004 *Melbourne Journal of International Law* 2.

water. The key hypothesis is that privatisation of water services may negatively impact on the realisation of the human right to water if not carried out in accordance with the standards imposed by the right to water. The aim of chapter 3 is to analyse water privatisation from a human rights perspective, in particular the right to water as provided for under international human rights instruments and elaborated by treaty bodies and domestic legal systems.

The aim of chapter 4 is to analyse the nature and scope of States' duties to realise the right to water under international human rights law. The question this chapter attempts to address is: what obligations do States bear in the context of private sector participation in the provision of water services? The point of departure of this chapter is that States are bound by their domestic and international human rights obligations, both substantive and procedural, when they privatise basic services such as water supply.

Privatisation of human rights-sensitive services such as water brings with it a fundamental shift in the method for delivering positive human rights outcomes given the involvement of non-State actors.[54] A question explored in chapter 5 is whether a human right to water under international human rights law impose duties on non-State actors participating in the provision of water services and, if so, what is the nature and scope of such duties? The hypothesis of this chapter is that international human rights law imposes certain human rights responsibilities on non-State actors involved in the provision of water services. Chapter 5 aims to identify and discuss any normative standards applicable to non-State actors to ascertain their applicability within the context of water privatisation for holding water corporations to account. The second aim of chapter 5 is to analyse the normative standards imposed by the right to water and identify the duties, if any, applicable to non-State actors. Delineating non-State actors' duties imposed by the right to water will provide normative guidance to both State and non-State actors contemplating or involved in privatisation initiatives in respect of water services.

[54] The activities of MNCs often have a positive effect on economic, social and cultural rights. They provide much needed employment thus facilitating the right to work itself instrumental in the realisation of related socio-economic goods. Their innovation and the associated skills transfer can lead to the creation of new products, such as new medicines which facilitate the enjoyment of socio-economic rights such as the rights to health or an adequate standard of living. However, corporate ownership or control of goods for human welfare such as water or patents in life-saving drugs may drive the price of such goods out of reach of poor people if not properly regulated.

Chapter 6 aims to develop an accountability model incorporating good practices from different jurisdictions for holding State and non-State actors involved in the provision of water services accountable for the right to water. It grapples with the question as to what model of accountability consistent with the right to water can be used to guide State and non-State actors involved in the provision of water services. The hypothesis of this chapter is that it is possible to devise an accountability model which incorporates mechanisms to safeguard access to safe water which would enable State and non-State actors to comply with the standards imposed by the human right to water. This chapter seeks to develop an argument as to why such an accountability mechanism is necessary to give concrete effect to the normative obligations imposed by water as a human right and to facilitate monitoring and accountability.

1 4 Methodology

To address the above research questions and hypotheses, the dissertation will use traditional methods in the discipline of law and legal theory in the study of relevant international instruments and jurisprudence. However, different approaches will be used given the complexity of this subject. A historical analysis of primary legal sources such as international treaties and jurisprudence of UN treaty bodies and regional tribunals will be conducted. Secondary literature pertaining to the emergence of the right to water under international law and debates concerning State and non-State actor human rights responsibility will be analysed. This project will further examine empirical literature and secondary sources in relation to four case studies involving privatisation of water initiatives discussed in chapter 3 with a view to analysing their impact and implications for the beneficiaries of the right to water. The project will further use primary sources from across the world such as legislation, case law, regulations and complaints mechanisms as examples of good practices and accountability mechanisms on the implementation of the right to water.

1 5 Significance of the research

This dissertation aims to develop an accountability model which can serve as a guide to both State and non-State actors involved in the provision of water services to ensure compliance with the standards imposed by the human right to water. The

accountability model is closely tied to the normative content and obligations imposed by the right to water which I analyse in chapters 2[55] and 4.[56] The accountability model will thus serve to illustrate the implications of the normative standards imposed by water as a human right in water privatisation contexts. This dissertation proposes that both State and non-State actors' accountability for the right to water may help address some of the accountability issues raised by water privatisation without dispending with privatisation *per se*. Rather than perceiving the human right to water and water privatisation as mutually exclusive, this dissertation will attempt to demonstrate the potential complementarity between the human right to water and privatisation of water services if the latter is carried out in accordance with the normative standards imposed by the right to water.

1 6 Scope of the dissertation

Apart from personal and domestic uses, water is required for a range of different purposes. This includes water for agriculture, sanitation, health and for securing livelihoods and the enjoying of certain cultural practices.[57] This dissertation focuses only on the right to water for personal and domestic use. This includes water for consumption, hygiene, cleaning, cooking, and subsistence agriculture. This is consistent with the UN CESCR's approach that the "[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."[58] Winkler's doctoral dissertation addresses the issue of prioritisation and the right to water.[59] This dissertation does not address the question of water resource allocation as its main focus is on access to water for personal and domestic use.

Furthermore, although there is a tendency in some literature to lump the right to water as enshrining sanitation, this dissertation adopts the view that the two are distinct and should be treated separately. The CESCR took the position that there was not sufficient support under international law at the time for the right to sanitation

[55] See section 2 6, chapter 2 for further discussion on the normative content of the right to water.
[56] See section 4 2 1 - 4 2 4 for a discussion on the obligations imposed by the right to water.
[57] UN CESCR *General Comment 15* para 6.
[58] Para 2.
[59] See Winkler "The Human Right to Water" 8.

in the same manner as the right to water.[60] The Special Rapporteur submitted her report to the UN Human Rights Council on the subject of sanitation in 2009.[61] The Special Rapporteur's conclusion was to acknowledge that "there is an ongoing discussion about sanitation as a distinct right" and "a trend towards recognition of such a distinct right."[62] The Special Rapporteur has emphasised that sanitation is a "distinct right" on account of its specific dignity dimensions.[63] Additionally, sanitation does not necessarily have to imply water-borne sanitation as dry sanitation practices are moving away from reliance on water for sanitation purposes thus severing the specific linkage with water.

Lumping of water and sanitation together may also lead to the former being overshadowed by the latter "buttressing the practice of treating sanitation as the poor sister of water, whether in political commitments, funding or implementation."[64] For the above reasons, this dissertation takes the view that the right to water is distinct from and does not include the right to sanitation and will treat it as such in the ensuing discussion.

1 7 Overview of chapters

Chapter two will evaluate evidence for the emergence of the right to water as a human right under international human rights law and the nature and scope of this right. Particular attention will be paid to international human rights instruments in which the right to water is located or from which it has been derived as well as discussing and analysing other international treaties outside the realm of human rights, but broadly supportive of a right to water. Chapter 2 will also attempt to show that the right to water is emerging as a rule of customary international law. In support hereof the chapter will illustrate how the right to water is being increasingly recognised in both binding and non-binding international instruments. Furthermore, this chapter will discuss the increasing recognition of the right to water at the

[60] M Langford, J Bartram & V Roaf "Revisiting Dignity: The Human Right to Sanitation" in M Langford & A Russell (eds) *The Right to Water: Theory, Practice and Prospects* (2011) 10.
[61] See United Nations Human Rights Council Report of the Independent Expert on the Issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation (2009) UN Doc A/HRC/12/24 (hereinafter referred to as "Special Rapporteur Sanitation Report)."
[62] Para 59.
[63] The Special Rapporteur stated that "[one might argue that, because dignity pervades the issue of sanitation and sanitation cannot be entirely subsumed into any other existing human right, it should be considered a distinct human right." See Special Rapporteur *Sanitation Report* para 58.
[64] Langford et al "The Human Right to Sanitation" in *The Right to Water* 10.

municipal level, highlighting the national constitutions and domestic laws in which the right has been recognised.

Chapter 3 will attempt to define privatisation initiatives in the context of water services, and thereby delineate the key features of the privatisation process this study intends to focus on. Particular attention will be paid to the increased participation by non-State actors in the water services sector. Access to adequate, safe and affordable water, rights of participation, access to information, monitoring and regulation and access to remedies for breach are some of the issues to be confronted whenever a private entity takes over responsibility for the provision of water services. Chapter 3 will attempt to illustrate the potential impact of privatisation on the human right to water through examining concrete issues which arise in the context of water privatisation with the aid of four select examples of water privatisation from Tanzania, Bolivia, The Philippines and South Africa.

Chapter 4 discusses the origins and development of typologies of State duties as well as their significance for understanding State obligations in respect of the right to water. An approach has emerged in terms of which State obligations under international human rights treaties are analysed as entailing four types or levels of obligations, the obligations to respect, protect, promote and fulfill the rights in question.[65] Although the main focus of this chapter is on the obligations imposed on States under international human rights law, the chapter will also analyse comparative national jurisprudence from select national jurisdictions to understand to what extent, if any, national courts have applied the four-fold typology of respect, protect, promote and fulfill in their interpretation of respective national constitutions and legislation providing for the right to water. Chapter 4 seeks to provide a detailed analysis of the obligations that the right to water imposes on States. It outlines and evaluates the approach of treaty monitoring bodies, customary international law, reports of the Special Rapporteur on the right to water and the jurisprudence of regional and national judicial and quasi-judicial bodies in elucidating the scope of the

[65] See A Eide "Economic, Social and Cultural Rights as Human Rights" in A Eide, C Krause & A Rosas *Economic, Social and Cultural Rights* (2001) 23-24. See also Craven who points out that not only does such an approach provides a detailed analytical framework in which a clearer understanding of State obligations in respect of human rights may be achieved, but also serves to counteract some of the traditional assumptions that tended to distinguish economic, social and cultural rights from civil and political rights. This is because the obligations to respect, protect and fulfill can be identified in respect of every human right thereby counteracting the notion that economic, social and cultural rights are solely 'positive rights' any more than civil and political rights being solely "negative rights". See Craven *The International Covenant* 109.

obligations imposed by socio-economic rights in general and the right to water in particular. Identifying obligations imposed by the right to water is fundamental to the accountability model developed in this dissertation. Significantly, States need to know what they are obliged to do when contemplating and implementing a privatisation project in respect of water services in order to comply with the obligations imposed by the right to water.[66]

Chapter 5 will illustrate how the State-centric focus of the human rights approach is increasingly being challenged given the emergence of powerful non-State actors capable of abusing human rights. Chapter 5 will further demonstrate how the necessity to ensure that non-State actors comply with human rights standards has seen the emergence of initiatives attempting to impose human rights responsibilities on non-State actors. This includes such voluntary initiatives as corporate codes of conduct, domestic legislation and other multi-stakeholder initiatives. This dissertation will attempt to show how a combination of hard law initiatives such as domestic legislation and voluntary initiatives have the potential for holding corporations responsible for the right to water in privatised contexts. This dissertation will further discuss and analyse some hard-law responsibilities imposed by human rights on non-State actors such as the duties to respect and the duty to provide remedies.[67]

Involving non-State actors in the provision of water services requires clearly defining the scope of the functions delegated to such entities. To ensure accountability, chapter 6 will demonstrate how States and non-State actors involved in the provision of water services can have clearly designated roles and responsibilities derived from the normative commitments of water as a human right. The accountability model developed in this chapter seeks to establish regulatory standards to enable compliance by both State and non-State actors to be more effectively monitored.[68] Although this dissertation is mainly concerned with the right to water under international law and the implications of privatisation thereof, the implementation of the right to water takes place at the municipal level. The chapter thus goes beyond articulating normative considerations and looks at implementation at the national level by highlighting good practices on the practical implementation of

[66] MM Sepulveda Obligations under the International Covenant on Economic, Social and Cultural Rights (2003) 4.
[67] See section 5 3, chapter 5.
[68] See Special Rapporteur Report para 16.

the right to water and draws from national experiences such as model legislation, case law, regulations, and complaints mechanisms. In the process, it also highlights practices or legislative provisions which have negative implications for the right to water and should be avoided.

Chapter 7 will provide a summary of the conclusions reached throughout the study. It will also seek to articulate the theoretical contribution of the study for scholarship in this field as well as the key legal and policy implications for States, international and regional bodies such as the World Bank, the Southern African Development Community (SADC) as well as MNCs. I anticipate that the proposed accountability model will also be useful to civil society organisations working in the field of socio-economic rights in general and the right to water in particular.

Chapter 2

The nature and scope of right to water under international law

2 1 Introduction

The 2010 United Nations (hereinafter referred to as the "UN") General Assembly[1] and the UN Human Rights Council[2] resolutions recognising a human right to water provide acknowledgement of a problem that affects one-third of humanity – close to one billion people without access to safe water and 2.6 billion without access to improved sanitation services. Although the UN Committee on Economic, Social and Cultural Rights (hereinafter referred to as the "CESCR") attempted to elaborate the legal basis, scope and content of the right to water way back in 2002, the legal basis of the right to water under international law remains the subject of intense debate. The resolutions and general comments adopted by UN institutions are a very significant political step towards the recognition of the right to water. However, from a legal perspective many questions remain as to the legal status of the human right to water under international human rights law.[3] The Universal Declaration of Human Rights (hereinafter referred to as "UDHR") does not expressly mention a human right to water. The two major international human rights treaties, the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR")[4] and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "ICESCR")[5] do not explicitly refer to a right to water.[6] This raises a plethora of questions. What is the legal status of the right to water under international human rights law? What is the scope and normative content of such a right? In order to answer these questions, a detailed analysis of the possible legal basis, scope and content of the right to water under international human rights law is required. This

[1] See UN *General* Assembly *The Human Right to Water and Sanitation* (2010) A/64/L.63/Rev.Add.1 para 4.
[2] See UN Human Rights Council *Human Rights and Access to Safe Drinking Water and Sanitation* (2010) UN Doc A/HRC/15/L.14 para 6.
[3] IT Winkler The Human Right to Water: Significance Legal Status and Implications for Water Allocation (2012) 11.
[4] International Covenant on Civil and Political Rights (1966) UN Doc A/6316 (hereafter "ICCPR").
[5] International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316 (hereafter "ICESCR").
[6] See A Cahill "The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water" (2005) 9 *The International Journal of Human Rights* 389 390. See also A Kok "Privatisation and the Right of Access to Water" in K De Feyter & FG Gomez (eds) *Privatisation and Human Rights in the Age of Globalisation* (2005) 259 260; M Williams "Privatisation and the Human Right to Water: Challenges for the New Century" (2006-2007) 28 *Michigan Journal of International Law* 467 473.

chapter will consider and evaluate the legal status of the right to water from a legal perspective. The chapter will also explore the content, scope and nature of such a right if it is found to exist.

This chapter is divided into three parts. The first part will trace the genesis of the right to water under international law. This will entail a discussion of the various international conferences and declarations from the early 1970s in order to show how these laid the basis for the emergence of the push for recognition of the human right to water. The focus will be on the various debates that spurred the rise of the right to water such as the conceptualisation of water as either a human right or an economic good. The second part will discuss and analyse the legal basis for the right to water under international human rights law. Particular attention will be paid to international human rights instruments in which the right to water is located or from which it has been derived. This will be followed by a discussion and analysis of other international treaties outside the realm of human rights, but broadly supportive of a right to water. Universal and regional treaties, customary international law and other soft law declarations will be considered. The Vienna Convention on the Law of Treaties explicitly provides that the ordinary meaning, context and the object and purpose of provisions of these treaties must be taken into account in their interpretation.[7]

In addition to treaty provisions, the question as to whether the right to water has metamorphosed into customary international law will also be examined. In that regard, a number of States' declarations, resolutions, statements, national constitutional and statutory provisions relating to the right to water will be relevant.

In this chapter, I will argue that a right to water is emerging as a rule of customary international law. In support hereof this section will illustrate how the right to water is being increasingly recognised in both binding and non-binding international instruments. Furthermore, this section will also discuss the increasing recognition of the right to water at the municipal level, highlighting the national constitutions and laws in which the right has been recognised. The final part of this chapter will focus on the normative content of the right to water. This will be followed by a discussion and analyses of some objections that have been raised against the recognition of a right to water under international human rights law and responses thereto. The concluding section will seek to synthesise and evaluate the evidence for the

[7] See Vienna Convention on the Law of Treaties (1969) UN Treaty Series 1155 331.

emergence of the right to water as a human right under international law and the nature and scope of this right.

2 2 Emergence of the right to water under international law

The emergence of the discussion on the right to water is traceable to the 1970s but it is only recently, particularly the 1990s that the debate gained in momentum.[8] Several reasons have been cited for the current prominence of the right to water debate in international human rights and development discourse. These include normative developments in international human rights law, the cumulative effect of a significant number of international conferences focusing on the environment and water. The current global water crisis highlighted in chapter 1 and the consequent inclusion of water in the development agenda has spurred the call for a right to water.[9] The debates surrounding the conception of water in a binary fashion as either a commodity to be traded on the market or a public and social good to which everybody has a right of access may also have given more impetus to this debate.[10] The latter is particularly noted by Bluemel who asserts that:

> "Calls for recognition of a human right to water have largely resulted from mistrust and fear of treating water as an economic good…many scholars fear that if water is

[8] SMA Salman & S McInerny-Lankford *The Human Right to Water: Legal and Policy Dimensions* (2004) 7-16. The authors trace the emergence of the campaigns towards recognition of the right to water from the 1970s through various international conferences and declarations, culminating in the adoption of General Comment 15 on The Right to Water by the Committee on Economic, Social and Cultural Rights in 2002 (hereafter "General Comment No 15 (2002)") by the UN Committee on Economic, Social and Cultural Rights.

[9] P Parmar *Revisiting the Right to Water* (Unpublished LLM thesis) University of British Columbia (2006) 9. Salman & McInerney-Lankford for example who point that:

> [i]t took the Committee on Economic, Social and Cultural Rights about 13 years between the time it issued the first General Comment in 1989, and General Comment No 15 recognising a human right to water in 2002. During those years, the world community had given increased attention to water resources management due to the vast array of problems faced in this sector. A large number of conferences and forums have been held, and resolutions and declarations have been adopted by those forums. Similarly, the General Assembly of the United Nations adopted a number of resolutions on issues related to water resources. See Salman & McInerney-Lankford *The Human Right to Water* 6.

[10] See W Vandenhole & T Wielders "Water as a Human Right-Water as an Essential Service: Does it Matter?" (2008) 26 *Netherlands Quarterly of Human Rights* 391-424. Bluemel has further explained that:

> the international community first proposed treating water as an economic good in an attempt to ensure water resources for all by minimising inefficiencies through the pricing system. The strategy was simple: higher prices will encourage only those uses which are most valuable and will minimise waste thereby increasing the total amount of water resources for use by households. See E Bluemel "Implications of Formulating Human Right to Water" (2004) Ecology *Law Quarterly* 957 962.

> perceived solely as an economic good, then access may be determined based purely upon market forces, without regard to equity or need."[11]

The genesis of the debate on the right to water is traceable to the Stockholm Declaration adopted at the 1972 UN Conference on Human Environment which identified water as one of the natural resources that needed to be safeguarded.[12] In 1977, the UN held the Mar Del Plata Water Conference in Argentina which was devoted exclusively to discussing the emerging global water resources problems.[13] A significant outcome of the conference was the adoption of a UN General Assembly resolution in 1980, proclaiming the period 1981 to 1990 as the "International Drinking Water Supply and Sanitation Decade."[14] Salman and McInerney-Lankford emphasise that the debate on the right to water is traceable to this conference, particularly Resolution II on "Community Water Supply."[15] The resolution declared for the first time that:

> "All peoples, whatever their stage of development and their social and economic conditions have the right to have access to drinking water in quantities and of a quality equal to their basic needs."[16]

---

[11] Bluemel 2004 *Ecology Law Quarterly* 963.

[12] Principle 2 of the 1972 the UN Conference on the Human Environment, held in Stockholm, identified water as one of the natural resources that needed to be safeguarded. It specifically provided that "the natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of the present and future generations through careful planning or management, as appropriate." See Salman & McInerney-Lankford *The Human Right to Water* 7. See also SC McCaffrey "A Human Right to Water: Domestic and International Implications" (1992) 5 *Georgetown International Environmental Law Review* 1-24; P Gleick "The Human Right to Water" (1998) 1 *Water Policy* 487-503; Bluemel 2004 *Ecology Law Quarterly* 957-1006.

[13] The UN held the Mar del Plata Water Conference in Argentina in 1977. The Conference's main focus was to discuss the emerging water resources challenges. The conference subsequently issued the Mar del Plata Action Plan, which sought to tackle these water resources challenges. See UN Mar del Plata Water Conference Report UN Doc No E/Conf.70.29 (1977).

[14] The UN General Assembly in Resolution 35/18, adopted on November 10, 1980, after referring to the Mar del Plata Action Plan, proclaimed "the period 1981–1990 as the International Drinking Water Supply and Sanitation Decade, during which Member States will assumed a commitment to bring about a substantial improvement in the standards and levels of services in drinking water supply and sanitation by the year 1990." See UN General Assembly Res 35/18 UN Doc A/RES/40/171. The UN General Assembly followed up on the matter and issued Resolution 40/171 on December 17, 1985 as a middle-of-the-decade reminder to States in which it implored them to work extremely hard to meet the commitments made under the International Drinking and Water Supply Decade as "significant progress towards meeting the objectives of the Decade by 1990 will require a much greater sense of urgency and priority on the part of Governments and the continued support of the international community." See UN Doc A/RES/40/171 (1985).

[15] McInerney-Lankford *The Human Right to Water* 8.

[16] The resolution went on to state that the universal recognition of water and, to a significant extent, the disposal of waste water are essential to both life and the full development of man as an individual

The 1992 UN Conference on Environment and Development's Agenda 21 on "Programme of Action for Sustainable Development" included a separate chapter on freshwater resources.[17] The overall objective laid down for freshwater resources was to satisfy the fresh water needs of all countries for their sustainable development.[18] Other notable developments include the adoption of the UN Convention on the Law of the Non Navigational Uses of International Water Courses in 1997.[19] This instrument, as will be discussed in more detail below, enjoins member States to pay special attention to providing sufficient water for vital human needs.[20]

The UN General Assembly also adopted a resolution proclaiming the year 2003 as the "International Year of Freshwater."[21] A further UN General Assembly resolution declared the period 2005-2015 the "International Decade for Action, 'Water for Life.'" The UN further declared March 22 as the World Water Day since 1993, highlighting the significance of the water situation.[22] A UN General Assembly resolution on the Right to Development in 2000 recognised the right to clean water as a fundamental human right.[23]

The UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 15 on the Right to Water (hereafter "General Comment 15")

---

and as an integral part of society. See further discussion by McInerney-Lankford *The Human Right to Water* 8.

[17] See Report of the UN Conference on Environment and Development, Rio de Janeiro UN Doc A/CONF.151/26/Rev.1 (1992) para 3.8(p) (hereinafter "the Rio Summit"). Agenda 21 of the Rio Summit on Programme of Action for Sustainable Development in its Chapter 18 on "Water Resources" proclaimed that "the overall objective laid down for freshwater resources is to satisfy the freshwater needs of all countries for their sustainable development." On the issue of the needs and the right to water, Chapter 18 further stated that "water resources have to be protected…in order to satisfy and reconcile needs for water in human activities. In developing and using water resources, priority has to be given to the satisfaction of basic needs."

[18] Salman & McInerney-Lankford *The Human Right to Water* 8.

[19] UN Convention on the Law of the Non Navigational Uses of International Water Courses (1997) UN Doc A/51/49.

[20] See article 10(2). It is agreed that the "vital human needs" provision refers to water required to sustain human life, including both drinking water and water for food production to avoid starvation. See PH Gleick *The World's Water: The Biennial Report on Freshwater Resources* (1998) 215.

[21] See UN General Assembly *International Year of Freshwater Declaration* (2003) GA/Res 55/196.

[22] The UN General Assembly decided on December 22, 1992 to declare the 22nd March of each year *World Day For Water*, to be observed starting in 1993. See UN General Assembly *World Day for Water* (1992) GA/Res/47/193.

[23] The UN General Assembly adopted on 15 February 2000, states that the "rights to food and clean water are fundamental human rights, and their promotion constitutes a moral imperative both for national Governments and for the international community". The resolution further affirmed the right to development, as established in the Declaration on the Right to Development, as universal and inalienable, and re-emphasised that its promotion, protection, and realisation are an integral part of the promotion and protection of all human rights. See UN Doc A/RES/54/175 (2000) para 12(a).

recognised the existence of an independent right to water under international law.[24] It derived the right to water under articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "ICESCR").[25] In 2008, the UN established a special procedure on the right to water and sanitation. The mandate of the Independent Expert on the human right to safe drinking water and sanitation was initially established by the UN Human Rights Council in March 2008.[26] The UN Human Rights Council, in March 2011 extended and changed its title to Special Rapporteur on the human right to safe drinking water and sanitation ("hereinafter referred to as Special Rapporteur").[27] The Special Rapporteur's overall mandate entails undertaking a study and further clarification of the content of human rights obligations, including non-discrimination obligations, in relation to access to safe drinking water and sanitation. Furthermore, the Special Rapporteur's mandate includes studying the normative content of human rights obligations in relation to access to water and sanitation as well as to study responsibilities of the private sector in the context of private provision of safe drinking water and sanitation among others.[28] The Special Rapporteur has a number of thematic reports on the human rights obligations relating to obligations of States and responsibilities of non-State actors in the context of non-State provision of water services. The Special Rapporteur has recently issued reports on the MDGs relating to water and

[24] See CESCR *General Comment No 15* (2002). Although not legally binding, general comments are used by the CESCR to elaborate on the normative content and nature of the obligations imposed by the International Covenant on Economic, Social and Cultural Rights (ICESCR). See M Craven "The Committee on Economic Social and Cultural Rights" in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook,* (2001) 455-457 for a discussion of the legal status of General Comments. See also C Blake "Normative Instruments in International Human Rights Law: Locating the General Comment" (2008) 12 *Centre for Human Rights & Global Justice Working Paper No 17* <http://www.chrgj.org/publications/docs/wp/blake.pdf> (accessed 16.06.2010); See also S Tully "A Human Right to Access Water? A Critique of General Comment No. 15" (2008) 26 *Netherlands Quarterly of Human Rights* 35 37-38 who notes that the CESCR derived the right to water from articles 11(1) and 12(1) of the ICESCR.

[25] International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316.

[26] UN Human Rights Council *Human Rights and Access to Safe Drinking Water and Sanitation* (2008) *Resolution* 7/22. See paras 2(a)-(f) for an over view of the Special Rapporteur's mandate. Catarina de Albuquerque took up the mandate in November 2008 and her mandate enjoins her to carry out thematic research, undertake country missions, collect good practices, and work with development practitioners on the implementation of the rights to water and sanitation.

[27] UN Human Rights Council The Human Right to Safe Drinking Water and Sanitation (2011) A/HRC/RES/16/2.

[28] For the Special Rapporteur's mandate see <http://www.ohchr.org/EN/Issues/WaterAndSanitation> (accessed 07.05.2012).

recommendations from a human rights perspective,[29] on national and local planning for the implementation of the right to water.[30] In one of her recent reports, The Special Rapporteur has addressed the issue of stigma as it impacts the realisation of the right to water.[31] The Special Rapporteur has also issued a compendium of good practices, highlighting how the right to water can be implemented.[32] One of the major impetuses towards the emergence of the right to water was the conception of water within two different normative and analytical frameworks: water as a human right, on one hand and water as a commodity on the other.[33] This will be fully discussed below.

2 3 Moving from water as an economic good to water as a human right

The notion of regarding water as an economic good implies that all water services are based on the principle of full cost-recovery. The principle of full cost-recovery seeks the recovery of all costs related to the provision of water, primarily operationalised through the pricing of water. The 1992 International Conference on Water and the Environment adopted what became known as the "Dublin Statement and Principles on Water" (hereinafter referred to as "Dublin Statement."[34] Although not legally binding, it became an extremely important tool in the conceptualisation of water as an economic good. Principle 4 in particular provides that:

[29] See UN Human Rights Council Millennium Development Goals and the Right to Water and Sanitation: Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2010) A/HRC/65/254.
[30] See UN Human Rights Council National Plans of Action for the Realisation of the Rights to Water and Sanitation: Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2011) A/HRC/18/33.
[31] See UN Human Rights Council Stigma and the Realisation of the Human Rights to Water and Sanitation: Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (2012) A/HRC/21/42.
[32] See UN Human Rights Council *Compilation of Good Practices: Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation* (2011) A/HRC/18/33/Add.1.
[33] See Vandenhole & Wilders 2008 *Netherlands Quarterly of Human Rights* 391-424.
[34] In 1992, the World Meteorological Organisation held an International Conference on Water and Environment in Dublin and the result was the Dublin Statement articulating various principles on water resources management which was commended to the world leaders participating at the UN Conference on Environment and Development in Rio de Janeiro. See Dublin Statement on Water and Sustainable Development (1992) <http://www.gdrc.org/uem/water/dublin-statement.html> (accessed 03.04.2010) (hereafter the "Dublin Principles.")

> "Water has an economic value in all its competing uses and should be recognised as an economic good...Managing water as an economic good is an important way of achieving efficient and equitable use."[35]

It must be noted that the accompanying language, often not cited by protagonists on both sides of the water debate, is quite illuminating. Principle 4 of the Dublin Statement affirmed "the basic right of all human beings to have access to clean water...affordable."[36] The Dublin Statement's assertion of water at an affordable price perhaps is recognition that if treated solely as an economic good, the supply of safe and adequate water may be imperilled. The poor and other marginalised members of society may not be able to afford the cost of accessing water were it to be treated as a purely economic good.

The World Bank adopted the economic good model of the Dublin Statement as its guiding principle. It introduced the principle of full cost-recovery - a corollary of applying the economic good model - as conditionality for loans in the water sector, especially in the developing world. The principle of full cost-recovery meant that the State or non-State supplier of water services should be able to recover the full costs of supplying water to all users.[37] The proposal to treat water as an economic good was predicated on the belief that treating it as such would, firstly, ensure access to water resources for all. Secondly, it would minimise inefficiencies through pricing techniques. The reasoning is explained in the following terms by Bluemel who states that cost-reflective pricing "will encourage only those uses which are most valuable and will minimise waste, thereby increasing the total amount of water resources for use by households."[38] This entailed introducing the cost recovery principle within the tariff system and opening up the water sector for private sector involvement and foreign investment.[39]

---

[35] See Dublin Principle 4.
[36] Principle 4.
[37] Bluemel 2004 *Ecology Law Quarterly* 964.
[38] 962.
[39] See P Bond "Water Commodification and Decommodification Narratives: Pricing, Policy Debates from Johannesburg to Kyoto to Cancun and Back" (2004) 15 *Capitalism Nature Socialism* 7 8. For further discussion on the principle of cost recovery within the water delivery and management sector, see also V Petrova "At the Frontiers of the Rush for Blue Gold: Water Privatisation and the Human Right to Water" (2006) 31 *Brooklyn Journal International Law* 557 578-580; K Bakker "The `Commons' versus the `Commodity': Alter-globalization, Anti-privatization and the Human Right to Water in the Global South" (2007) 39 *Antipode* 430 431; Williams 2006-2007 *Michigan Journal of International Law* 461-505; JW de Visser & C Mbazira (eds) *Comparing Water Delivery in South Africa and the Netherlands* (2006); M Barlow & T Clarke *Blue Gold: The Fight to Stop the Corporate Theft of the World's Water* (2002); J Rothfeder *Every Drop for Sale: Our Desperate Battle Over Water in a*

Scholars and human rights activists reacted differently to this proposition of treating water as an economic good and the consequent privatisation of water services. Vandenhole and Wielders argued that what makes water an economic good is that drinking water is a good with limited supply and unlimited demand.[40] The two authors however proposed categorising water as a quasi-commodity.[41] They argue that water cannot fulfill all the conditions to be a real commodity in the capitalist sense of the word. They pointed out that the cost of water is high as it is expensive to produce, and not always available as potable water.[42] Some scholars suggest that to consider water as an economic good without addressing issues like higher tariffs and disconnections conflicts with treating water as a human right.[43] This is because full cost recovery may lead to the removal of State subsidies and to the implementation of full cost recovery measures. Such measures may affect the poor and vulnerable disproportionately, and result in increased disconnections of water due to non-payment, and a decrease in the quality of service.[44] Bluemel, for instance, pointed out that the principle of full cost-recovery was likely to price water out of the reach of poor and marginalised communities thereby curtailing their access to an adequate supply of safe water necessary to meet their basic needs.[45]

An alternative argument, represented by scholars like Vandenhole and Wielders is to argue that considering water as an economic good is not necessarily in conflict with the human right to water. They point out that:

> "The qualification as an economic good does not mean that water should be sold at the highest price or that water services should be liberalised and privatised, but in principle simply indicates that it is scarce. Nevertheless, it cannot be denied that once a good has been qualified economic, it may be subject to trade liberalisation policies and subjected to market mechanisms. If this happens without any regulation, the outcome risks being more often than not in violation of human rights law."[46]

World About to Run Out (2001); V Shiva *Water Wars: Privatisation, Pollution and Profit* (2002); B McDonald & D Jehl (eds) *Whose Water Is It?: The Unquenchable Thirst of a Water-Hungry World* (2003).

[40] Vandenhole & Wielders 2008 *Netherlands Quarterly of Human Rights* 403.

[41] 403.

[42] 403.

[43] See V *Shiva Privatisation, Pollution and Profit* (2002) ix.

[44] Vandenhole & Wielders 2008 *Netherlands Quarterly of Human Rights* 403.

[45] Bluemel 2004 *Ecology Law Quarterly* 963.

[46] Vandenhole & Wielders 2008 *Netherlands Quarterly of Human Rights* 421.

The economic good versus human right conception of access to water thus intensified the campaign by human rights practitioners for the formal recognition of the human right to water. The debate also forms part of the wider political and jurisprudential debate surrounding privatisation of water services and its implications for the realisation of the right to water. The latter is fully discussed and analysed in chapter 3.

2 4 Conclusion

The above discussion provided an overview of the various initiatives, starting with the 1972 UN Conference on Human Environment in which water was recognised as a basic need. What became clear was the growing call for the recognition of the human right to water. Developing concurrently with the above was the push for the recognition of water as a commodity susceptible to be traded on the market. This approach is more forcefully reflected in the Dublin Statement highlighted above. This was marketed as the panacea to the global water crisis, and serving as a precursor to widespread privatisation of water services.

The conception of water as an economic good also stimulated the lobby for the explicit recognition of water as a human right. Human rights practitioners argued that water is a basic need, a human right and a public good hence its commodification would lead to lack of access, especially by the poor and vulnerable members of society. The above debates thus gave the impetus toward vociferous calls from human rights practitioners for recognition of the right to water under international human rights law. As will be shown below, the UN took the initiative by construing a human right to water from the existing international human rights instruments. What is quite conspicuous is the shift toward water as an independent human right. The following section will examine the legal basis for a right to water under international human rights law. The relevant provisions contained in the various international human rights instruments will be examined and evaluated.

2 5 Legal basis for the right to water under international law

2 5 1 Introduction

Peter Gleick, writing more than a decade ago, asserted that one of the fundamental failures of development in the 20th century was a lack of universal access to water.[47] Gleick further posed the following question:

> "Is water so fundamental a resource, like air, that it was thought unnecessary to explicitly include reference to it at the time these agreements were forged? Or could the framers of these agreements have actually intended to exclude access to water as a right, while including access to food and other necessities?"[48]

The UDHR does not expressly mention a human right to water.[49] The two major international human rights treaties - the International Covenant on Civil and Political Rights[50] and the ICESCR (which is the core international legal instrument on economic, social and cultural rights) – do not explicitly refer to a right to water. It must therefore be analysed whether a human right to water is implicitly recognised in the provisions of these universal treaties. The only explicit references to a right to water are contained in the Convention on the Elimination of All forms of Discrimination Against Women (hereafter referred to as "CEDAW"),[51] the Convention on the Rights of the Child (hereafter referred to as "CRC"),[52] and the International Convention on the Protection and Promotion of the Dignity and Rights of Persons with Disabilities (hereafter referred to as the "Disability Convention").[53] It must be noted though that these latter instruments are limited *ratione personae* as will be fully considered below.

A study carried out by McCaffrey in 1992 concluded that there was a right at least to sufficient water to sustain life and that a State has the due diligence obligation to safeguard this right as a priority.[54] Gleick expanded upon McCaffrey's study and concluded that international law and evidence from the practice of States

[47] Gleick 1999 *Water Policy* 487-488.
[48] 490.
[49] Universal Declaration of Human Rights (1948) UN Doc A/810.
[50] International Covenant on Civil and Political Rights (1966) UN Doc A/6316.
[51] Convention on the Elimination of All Forms of Discrimination Against Women (1979) UN Doc A/34/46.
[52] Convention on the Rights of the Child (1989) UN Doc A/44/49.
[53] International Convention on the Protection and Promotion of the Rights of Persons with Disabilities (2006) UN Doc A/61/49.
[54] McCaffrey 1992 *Georgetown International Law Review* 7.

strongly support the human right to a basic water supply.[55] Equally, Bluemel noted that the absence of an explicit reference of a right to water under any universal human rights instrument should not be a bar to the recognition of a right to water. Bluemel argued that under the current international framework, a right to water may be characterised as subordinate and necessary to achieve the primary human rights recognised directly by international human rights treaties.[56]

The following section begins with an examination of the doctrine of the interdependence of all human rights as potentially the most promising theoretical basis for supporting the derivation of the right to water under international human rights law. For the latter, I will adopt the framework developed by Craig Scott on the related interdependence of all human rights to fully explain the *raison d'etre* for the derivation of the right to water from related rights. This is followed with a discussion of one of the watershed developments in standard setting with regard to the right to water, the CESCR's General Comment 15. The section will further review the legal bases for deriving a right to water under international law as developed in the academic literature and the jurisprudence and general comments of UN bodies. The main focus will be on international human rights law, focusing particularly on relevant provisions of the UDHR, ICESCR, ICCPR, CEDAW, CRC and the Disability Convention. This will be followed by a discussion of other legally binding universal instruments such as humanitarian and international criminal law treaties.

2 5 2 International human rights treaties and declarations

McCaffrey, writing nearly two decades ago argued that the human right to water is implicit in the provisions of the International Bill of Rights (the UDHR, ICESCR and the ICCPR)[57] as a derivative right.[58] These include the rights to an adequate standard of living, food, health and life. McCaffrey and other scholars' argument is

[55] Gleick 1998 *Water Policy* 489. A significant number of scholars are supportive of deriving the right to water from the existing international human rights law instruments. See for example, Williams 2006 *Michigan Journal of International Law* 505; R Pejan "The Right to Water: The Road to Justiciability (2004) 36 *George Washington International Law Review* 1181-1210; A Hardberger "Life, Liberty and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates" (2005) 4 *Northwestern International Journal on Human Rights* 331-362.
[56] Bluemel 2004 *Ecology Law Quarterly* 963.
[57] The International Bill of Human Rights is the collective term for the UDHR, the ICESCR and its Optional Protocol, and the ICCPR and its two Optional Protocols.
[58] See McCaffrey 1992 *Georgetown International Environmental Law Review* 8-10.

that the fulfillment of these rights is impossible without water.[59] Gleick argued that access to water can be derived from the explicit rights to health and an adequate standard of living contained in the ICESCR.[60] This is because the provision of safe and adequate water is necessary for the full realisation of such rights.[61] This section will examine whether indeed a universal human right to water can be derived from international human rights law. The analysis will focus on the provisions of international human rights treaties. These will include the UDHR, ICESCR, ICCPR, CEDAW, CRC and the Disability Convention.

2 5 2 1 The interdependence of human rights

The UN has emphasised the interrelatedness, indivisibility and interdependence of all human rights through a number of resolutions and declarations. One of the distinctive aspects of the UDHR is that it emphasised the interdependence and interrelatedness of all human rights by placing all human rights; civil, political, social, economic and cultural rights at the same level.[62] The views of the drafters of the UDHR in this respect are illuminating on the importance they placed in looking at human rights in an integrated and interrelated fashion. Renè Cassin for example regarded the inclusion of economic and social rights parallel to civil and political rights in the UDHR as one of the major pillars in asserting the interrelatedness of all human rights.[63] John Humprey argued that without economic, social and cultural rights, civil and political rights would hardly have any meaning for most people.[64] It must however be noted that the deep ideological division of the world of the fifties led to the categorisation of human rights thereby undermining the holistic vision of human rights propounded by the UDHR. This is reflected in the adoption of two separate human rights conventions in 1966, the ICESCR encapsulating economic, social and cultural rights, and the ICCPR enshrining civil and political rights.[65]

---

[59] M McFarland Sanchez-Moreno & T Higgins “No Recourse: Transnational Corporations and the Protection of Economic, Social and Cultural Rights in Bolivia” (2003-2004) 27 *Fordham International Law Journal* 1663 1726-1728.
[60] Gleick 1998 *Water Policy* 492.
[61] 492.
[62] The UDHR contains both civil and political and economic and social rights in the same instrument.
[63] See AAC Trindade “The Interdependence of all Human Rights-Obstacles and Challenges” (2002) 50 *International Social Science Journal* 513 513.
[64] 514.
[65] 513.

The 1968 UN World Conference on Human Rights (hereinafter referred to as the "Teheran Conference") marked the first systematic reaction to the fragmentation of human rights reflected above. The Teheran Conference forcefully asserted the interdependence and indivisibility of all human rights.[66] This was a remarkable victory given a world that was divided by the bipolar characterisation of the cold war. In the words of Trindade, it marked a "rescuing of the basic philosophy laid by the UDHR in this regard which for years had been undermined by the ideological struggle of the cold war."[67] Additionally, the 1993 UN Declaration and Programme of Action of Vienna, adopted at the Second World Conference on Human Rights (hereinafter referred to as the "Vienna Conference") reasserted the interdependence and indivisibility of all human rights.[68]

The UN General Assembly noted the interrelated nature of all human rights in the first resolution on the issue in 1977, declaring that all human rights and fundamental freedoms are indivisible and interdependent. The UN General Assembly further noted that the promotion and protection of one category of rights can never exempt or excuse States from protecting other rights.[69] The UN General Assembly followed up with a similar resolution in 1987 in which it stated that freedom from fear and want can only be eradicated when all people enjoy economic, social and cultural rights, as well as their civil and political rights.[70] The UN's position on the

[66] See generally United Nations *Final Act of the International Conference on Human Rights* UN Doc A/CONF.32/41 (1968).
[67] Trindade 2002 International Social Science Journal 514.
[68] See UN Declaration and Programme of Action adopted by the World Conference on Human Rights (1993) UN Doc A/Conf.157/24 para 5.
[69] UN General Assembly *Effective Enjoyment of Human Rights and Fundamental Freedoms* (1977) A/RES/32/130. Some of the UN General Assembly resolutions addressing the issue of the indivisibility and interrelatedness of both economic, social and cultural rights and civil and political rights include General Assembly resolution A/RES/40/114(1985) which states in its preamble that "all human rights and fundamental freedoms are indivisible and interdependent and that the promotion and protection of one category of rights can never exempt or excuse States from the promotion and protection of the other rights…the full realisation of civil and political rights is inseparably linked with the enjoyment of economic, social and cultural rights." Another UN General Assembly resolution emphasised that "[e]qual attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political rights and economic, social and cultural rights." See preamble to UN General Assembly *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights* (1986) A/RES/41/117. Another UN General Assembly resolution adopted in 1988 noted that " the realisation of the right to development may help to promote the enjoyment of all human rights and fundamental freedoms [and that] equal attention and urgent consideration should be given to the implementation, promotion and protection of economic, social, cultural, civil and political rights." See UN General Assembly *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights* (1988) UN Doc A/RES/43/113.
[70] See UN General Assembly *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights* (1987) UN GA A/RES/42/102. Similarly, the Vienna Declaration affirms that "All human rights are universal, indivisible and interdependent and interrelated. The international

interdependence, interrelatedness and indivisibility of all human rights is an endorsement of the position that each category of rights is indispensable to the realisation of the other, and no hierarchical categorisation should be made between them. Interdependence of human rights means that the realisation of one right (or group of rights) may require the enjoyment of others despite their distinctiveness as particular rights.[71] Understanding interdependence of human rights is important as it helps elaborate the extent to which distinct rights are mutually dependent on each other thereby making rights effective.

Craig Scott has argued that the interdependence of human rights may be understood in two senses: "organic interdependence" and "related interdependence."[72] Organic interdependence means that "one right forms part of another right and may therefore be incorporated into that latter right."[73] According to Scott, the organic rights perspective means that "interdependent rights are inseparable or indissoluble in the sense that one right (core right) justifies the other (derivative right)."[74] Scott explains that "related interdependence" refers to a situation where rights are treated as complementary yet separate, "for instance to protect right x will directly protect right y."[75] The significance of the organic framework to the understanding of the interdependence of human rights is that protecting a core right will mean directly protecting a derivative right as "[t]he goal is to render rights meaningful and non-illusory."[76] Interdependence in the "related rights" sense means that the rights in question are "mutually reinforcing or mutually dependent but distinct."[77] According to the related interdependence perspective, rights are treated as equally important yet separate hence "to protect right x will indirectly protect right

---

community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis" (para 5). The Declaration also goes on to state that "[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing" (para 8). See UN *Vienna Declaration and Programme of Action* (1993) UN Doc A/CONF.157/24. The principle of the interrelatedness and indivisibility of all human rights had also been endorsed by the UN General Assembly in 1986. Article 6 (2) of the Declaration states that "[a]ll human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights." See UN General Assembly *Declaration on the Right to Development* (1986) UN Doc A/41/53 para 6(2).

[71] DJ Whelan *Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights* (2008) <http://www.econ.uconn.edu/working/7.pdf> (accessed 28.06.2010).

[72] C Scott "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 *Osgoode Hall Law Journal* 769 779-786.

[73] 779-786.

[74] 779-780.

[75] 783

[76] 781.

[77] 783.

y."[78] The significance of the related interdependent framework in the understanding of the interdependence of human rights is that protecting one right indirectly results in the protection of another right. There is a profound and multilayered connection within economic, social and cultural rights and between economic, social and cultural rights and civil and political rights. As a consequence, neither set of rights has a full meaning without the other and "attempting to find a priority between them is a fruitless endeavor."[79]

Applying this analysis, it becomes clear that the right of access to water is a human right as it is intrinsically connected and is a part of other human rights. It is indispensable to the realisation of those other rights. All the major rights explicitly enshrined in the ICESCR and other human rights instruments, such as the right to life would be impossible to realise in the absence of safe water.[80] The absence of an explicit reference to a right to water in the ICESCR is therefore not a sufficient argument to deny access to water the status of an independent human right.[81] Salman and McInerney-Lankford persuasively argue that:

> "Human rights are protected differently in different contexts and times, and their effective protection can in no way be viewed as static or unchanging, but rather as constantly evolving. This flux is further compounded by the fact that different human rights are deeply interwoven and are rarely realised in a singular or isolated manner, but rather exist in complex interdependency. Thus, the argument of the Comment that many human rights are interwoven around water, and cannot possibly be realised without a right to water, rests on a considerably solid basis."[82]

The doctrine of interdependence and interrelatedness of human rights is thus aptly illustrated in the case of access to water for domestic and personal use. Even without the word "water" being directly referred to, very few would question the existence of a right to water in principle. The CESCR in General Comment 15 emphasised that the human right to water is indispensable and a necessary requirement for the realisation of other human rights.[83]

---

[78] 783.
[79] Salman & McInerney-Lankford *The Human Right to Water* 28.
[80] 8.
[81] EH Riedel "The Human Right to Water and General Comment Number 15" in EH Riedel & P Rothen (eds) *The Human Right to Water* (2004) 19 24.
[82] Salman & McInerney-Lankford *The Human Right to Water* 60.
[83] See CESCR *General Comment 15* (2002) para 6.

It is also important to note that none of the human rights, be it civil and political or economic, social and cultural rights are fully elaborated in human rights instruments. There is an imperative need for interpretative guidance, either from national or international courts or quasi-judicial tribunals such as UN human rights treaty bodies. It is within this light that the CESCR's derivation of the rights to water from the international Bill of Human Rights should be understood.

The importance of water as a human right has also been recognised in other international treaties outside the area of human rights. These include humanitarian law, international criminal law and international water law. Key components of the right to water such as the obligation to refrain from measures that impede access to water by civilians in war time and to ensure quality of water sources are effectively protected under humanitarian law. The following section discusses and analyses the extent to which access to water is protected under these international instruments. The inclusion of the need to ensure basic access to water in other universal instruments outside international human rights law is indicative of an evolving global acceptance of the critical importance of access to water.

2 5 2 2 Significance of General Comment No 15

The CESCR's adoption of General Comment 15 in 2002 marked a watershed development towards the emergence of the right to water as it triggered sustained discussion on the right, and its further recognition within the UN system. Although General Comment 15 is not itself legally binding, it is nevertheless an authoritative interpretation of the provisions of the ICESCR. The latter is legally binding on States that have ratified or acceded to it.[84] Although the General Comments issued by UN treaty bodies do not and cannot create new obligations for States, they often clarify and elaborate on States' existing obligations under the various UN treaties. Salman and McInerny-Lankford have pointed that the involvement by States in the reporting process invests such General Comments with the necessary legitimacy.[85] It is also noteworthy that the General Comments adopted by the treaty bodies are included in the CESCR's annual report to the Economic and Social Council (ECOSOC) of the UN, which is brought to the attention of the General Assembly. This gives the

[84] A Hardberger "Life, Liberty and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates" (2005) 4 *Northwestern Journal of International Human Rights* 331 348.
[85] Salman & McInerny-Lankford *The Human Right to Water* 8.

General Comments of UN treaty bodies some heightened form of legitimacy and legal weight due to this involvement of State parties to the treaties. The CESCR is the only UN entity officially authorised to interpret the ICESCR hence its General Comments carry significant legal authority. This is underlined by the fact that the CESCR's general comments are widely accepted in practice by States Parties to the ICESCR.[86] In that regard it should be noted that General Comment 15 does not in any way create new obligations for State parties to the ICESCR. It simply elaborates on the ICESCR's explicit provisions and expounds on the obligations these entail. It makes explicit the right of access to safe water as it is embodied in the provisions of the ICESCR and related human rights treaties.

Matthew Craven has underlined the importance of General Comments of the CESCR by stressing that although such interpretations of the ICESCR by the CESCR are not binding, they do have legal weight.[87] This is because in the absence of an authoritative procedure for settling different opinions in the interpretation of the ICESCR, the CESCR helps fill that void by issuing such General Comments.[88] Such a position was also echoed by Theodor Meron who also pointed out that although not legally binding, General Comments influence the States' reporting obligations and their internal and external behaviour.[89] On that basis General Comment 15 carries significant legal and political weight. This dissertation will therefore consult General Comment 15 for the interpretation of the different aspects relating to the right to water.[90]

2 5 2 3 Universal Declaration of Human Rights

The fundamental rights and freedoms recognised in the UDHR do not explicitly include a right to water. The UDHR however, does contain provisions that provide some measure of justification for the derivation of a right to water. As a General Assembly resolution, the UDHR is not binding *per se*.[91] However, its most

[86] See Winkler *The Human Right to Water* 40.
[87] See M Craven *The International Covenant on Economic, Social and Cultural Rights: Perspectives on its Development* (1998) 91.
[88] 91.
[89] See T Meron *Human Rights Law-Making in the United Nations* (1986) 10.
[90] Winkler also adopted a similar approach. See Winkler *The Human Right to Water* 41.
[91] Gleick points out that at the UN Conference on International Organisation, held in San Francisco in 1945 at which the UN Charter was formally adopted, it was suggested that the UN General Assembly draft a Bill of rights. The subsequent UN Charter required the Economic and Social Council to set up a commission for the promotion of human rights. The Commission on Human Rights held its first meetings in 1947 and agreed to prepare for the General Assembly both a declaration and a

fundamental provisions are generally thought either to have crystallised into customary international law or to constitute an authoritative interpretation of the UN Charter obligations.[92] Significantly, the broad human rights provisions contained in the UDHR have since been incorporated in legally binding form in many international human rights instruments.[93] Article 22 of the UDHR states that:

> "Everyone, as a member of society. . . is entitled to realisation, through national effort and international cooperation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."[94]

Article 25(1) further provides that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family."[95] McCaffrey has argued that such a standard of living could not exist without an adequate supply of water suitable for drinking.[96] Gleick also points out that the relevant notes from the original debates show that provisions relating to food, clothing and housing were not meant to be all inclusive.[97] Rather, they were inserted as representative of the component elements of an adequate standard of living.[98] Accordingly, the drafters of the UDHR did not explicitly exclude water as they considered water to be too obvious to include as one of the component elements.[99]

---

convention on human rights. Gleick further notes that, although not legally binding, such declarations often either express already existing norms of customary international law or, as in the case of some of the fundamental rights provisions in the UDHR, may over time crystallise into customary norms. Steiner & Alston point to the validity of arguments developed by scholars who view the UDHR either, as legally binding customary international law or an authoritative interpretation of the UN Charter. See HJ Steiner & P Alston *International Human Rights in Context* (2000) 143. The convention on the other hand, was to be drafted in the form of a legally-binding treaty. During late 1947 and early 1948, a draft declaration was developed and debated by the UN Commission on Human Rights. In mid-1948, the UN Commission on Human Rights presented a draft declaration to the UN Economic and Social Council. Article 22 of the draft provided that "[e]veryone has the right to a standard of living, including food, clothing, housing and medical care, and to social services, adequate for the health and well being of himself and his family." Gleick further notes that in the final debate over the document, the emphasis was refocused from providing a general standard of living to a more encompassing right to health and well-being. In 1948 the UN General Assembly approved the text of the UDHR by 48 votes, with 8 abstentions. The reworded article 22 (now article 25 of the UDHR) was adopted unanimously. See Gleick 1998 *Water Policy* 503.

[92] McCaffrey 1992 *Georgetown International Environmental Law Review* 8. Gleick is also supportive of such a position. See Gleick 1998 *Water Policy* 490.

[93] McCaffrey 1992 *Georgetown International Environmental Law Review* 8.

[94] UDHR, article 22.

[95] Article 25.

[96] Article 22.

[97] See P Gleick *The Human Right to Water* (2007) <www.pacisnt.org> (accessed on 26.06.2010) 2.

[98] 2.

[99] 2.

It is therefore logical to conclude that the drafters of the UDHR did not recognise water in explicit terms as they considered water "too obvious to include as one of the component elements" to an adequate standard of living.[100] This is because water is a necessary and indispensable element to the realisation of the other rights explicitly recognised in the UDHR. Gleick further argues that the drafters of the UDHR may have considered water to be as fundamental as air. He elaborates the "derivative right" argument as follows:

> "[S]atisfying the standards of [a]rticle 25 cannot be done without water of a sufficient quantity and quality to maintain human health and well-being. Meeting a standard of living adequate for the health and well-being of individuals requires the availability of a minimum amount of clean water. Some basic amount of clean water is necessary to prevent death from dehydration, to reduce the risk of water-related diseases, and to provide for basic cooking and hygienic requirements."[101]

The UDHR also includes rights that might be considered less fundamental than a right to water. These include the rights to work, to protection against unemployment, to form and join trade unions as well as rest and leisure.[102] This further supports the conclusion that article 25 of UDHR was intended to implicitly support the right to a basic water requirement for personal and domestic uses.[103]

2 5 2 4 International Covenant on Economic, Social and Cultural Rights

2 5 2 4 1 Water as a component of the right to an adequate standard of living

A significant question is whether a right to water is implicitly included in the rights explicitly provided for under the ICESCR. The rights to an adequate standard of living, health, housing and food will be explored in the following sections. The ICESCR provides for the right to an adequate standard of living that consists of several components. Article 11(1) of the ICESCR states that:

> "The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions."

---

[100] 2.
[101] Gleick 1998 *Water Policy* 490.
[102] See articles 23 and 24 of the UDHR.
[103] Gleick 1998 *Water Policy* 490.

The CESCR set forth in General Comment 15 its criteria for deriving the right to water from other related rights by stating that:

> "Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realisation of the right to an adequate standard of living, including adequate food, clothing and housing. ...The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival."[104]

It may be questioned why the drafters of the ICESCR did not explicitly mention access to water in article 11(1) while arguably less fundamental elements of an adequate standard of living such as adequate clothing and housing are explicitly referred to. The inference of the right to water from article 11(1) has provoked criticism from some scholars.[105] Stephen Tully, for instance, has argued that article 11(1) offered no interpretive space for the reading of new rights given the seemingly endless list of other rights that could be added.[106]

It must be noted that the overwhelming literature is supportive of such a stance of deriving the right to water from article 11 of the ICESCR.[107] The main explanation for the omission seem to be that freshwater was not the scarce and competed-for resource it is today at the time the ICESCR was drafted.[108] This position is supported by Malcolm Langford in his ensuing debate with Tully.[109] The use of the word "including" makes clear that the enumeration of adequate food, clothing and housing was not intended to be exhaustive, but rather serves as an illustration of constituent elements of an adequate standard of living. The drafters of

---

[104] See CESCR *General Comment No 15* (2002).

[105] See S Tully "A Human Right to Access Water? A Critique of General Comment No. 15" (2008) 26 *Netherlands Quarterly of Human Rights* 35-63. Two American lawyers have also criticised the derivation of the right to water from the provisions of the ICESCR. See M Dennis & D Stewart "Justiciability of Economic, Social and Cultural Rights: Should there be an International Claims Mechanism to Adjudicate the Rights to Food, Water and Health?" (2004) 98 *American Journal of International Law* 462-515.

[106] See Tully 2008 *Netherlands Quarterly of Human Rights* 35-63.

[107] See generally MaCaffrey 1992 *Georgetown International Environmental Law Review* 1-24; Gleick 1999 *Water Policy* 478-503; T Keifer & C Brolmann "Beyond State Sovereignty: The Human Right to Water" (2005) 5 *Non State Actors and International Law* 183-208.

[108] See Keifer & Brolmann 2005 *Non-State Actors and International Law* 195.

[109] Tully (2008) 26 *Netherlands Quarterly of Human Rights* 35-36; M Langford "Ambition that Overleaps itself? A Response to Stephen Tully's Critique of the General Comment on the Right to Water" (2006) 24 *Netherlands Quarterly of Human Rights* 434-459; S Tully "Flighty Purposes and Deeds: A Rejoinder to Malcolm Langford" (2006) 24 *Netherlands Quarterly of Human Rights* 461-472; M Langford "Expectation of Plenty: Response to Stephen Tully" (2006) 24 *Netherlands Quarterly of Human Rights* 473-479.

the ICESCR were reluctant to define the term "adequate standard of living" in explicit terms. It was argued that the implications of the concept were generally well understood that it had a general and broad meaning.[110]

The difficult issue though is to ascertain what other components are encapsulated by the right to an adequate standard of living. It appears there is no generally accepted definition in human rights scholarship or jurisprudence.[111] It can be argued that an adequate standard of living is realised when individuals live under conditions that enable them to participate in social life in a dignified manner. Access to safe and sufficient water is a key component to an adequate standard of living. Water is necessary for human health, personal and household hygiene. Access to water is also crucial to enable individuals and groups to carry out a range of activities such as work, education and cultural activities. Enjoyment of the preceding rights is important for active participation in social life and the realisation of other human rights.[112] It may also be important to draw parallels to the rights explicitly guaranteed in order to ascertain the components of the right to an adequate standard of living. Similar to the rights to housing and food, access to safe and sufficient water is absolutely necessary not only for an adequate standard of living but to sustain life itself as well as to live in dignity.[113] This dissertation therefore adopts the position that the right to safe and sufficient water is included in an adequate standard of living and has the same status as the rights to food and housing that are explicitly mentioned.

There is no doubt that access to a basic supply of safe and adequate water is a *conditio sine qua non* for the sustenance of human life itself. Keifer and Brolmann, for instance, argue that water is a fundamental precondition for the realisation of an adequate standard of living.[114] The two authors put the issue succinctly by stating that:

> "[I]t seems logically unsound to recognise the right to an adequate standard of living without concluding that this norm must encompass a right to access essential freshwater supplies. In our view, any interpretation to the contrary is impossible to reconcile with the object and purpose of article 11(1) ICESCR. It thus seems we may

[110] See MC Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1995) 25. See also Winkler *The Human Right to Water* 42-43.
[111] Winkler *The Human Right to Water* 43
[112] 43.
[113] 43-44.
[114] Keifer & Brolmann 2005 *Non State Actors and International Law* 195.

correctly infer an implied right to basic water supplies from the right to an adequate standard of living as enshrined in article 11(1) ICESCR."[115]

2 5 2 4 2 Water as a component of the right to health

Article 12(1) of the ICESCR provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The CESCR also derives a right to water from the above provision, stating that the right to water is also inextricably related to the right to the highest attainable standard of health.[116] The above position has been further articulated by the CESCR in General Comment 14 in its interpretation of the right to the highest attainable standard of health in article 12 of the ICESCR.[117] According to that authoritative interpretation by the CESCR, the right to health is not limited to a right to health care services only.[118] The CESCR has further noted that the drafting history and the express wording of article 12(2) of ICESCR acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life.[119] This extends to the underlying determinants of health such as access to safe and potable water.[120] This interpretation by the CESCR is persuasive in the light of the strong causal link between inadequate freshwater supplies and ill-health or even death, highlighted in chapter 1.

The interpretative strategy of deriving the right of access to water from the right to health has also been followed by other international human rights treaty bodies. The Committee on the Rights of the Child (hereinafter referred to as the "CRC Committee"), the treaty body charged with monitoring State compliance with the CRC has adopted the same interpretative stance. The CRC Committee stated that the obligation in article 24 of the CRC to ensure that children have access to the highest attainable standard of health meant that States have a duty to ensure access to safe water as such access is essential for children's health.[121] The former Special Rapporteur of the then UN Commission on Human Rights on the right of everyone to

[115] 195.
[116] See CESCR *General Comment No 15* (2002) para 3.
[117] See UN Committee on Economic, Social and Cultural Rights *General Comment No 14 The Right to the Highest Attainable Standard of Health* (2000) UN Doc E/C.12/2000/4 para 4.
[118] Paras 4 and 11.
[119] Para 4.
[120] Paras 4 and 11.
[121] UN Committee on the Rights of the Child *General Comment No 7: Implementing Child Rights in Early Childhood* (2005) (2006) UN Doc CRC/C/GC/7/Rev.1para 27(a).

the enjoyment of the highest attainable standard of physical and mental health[122] also emphasised that the right to health extended to the underlying determinants of health, such as access to safe and potable water.[123]

A purposive and teleological interpretation of article 12(1) of the ICESCR (as conducted by the CESCR) endorses the argument that the right to health extends to the right of access to water. Access to safe water is perhaps the most fundamental underlying determinant of health. It therefore seems clear that a right to access to essential quantities of safe water can also be derived from the right to health as envisaged in article 12(1) of ICESCR as articulated by the CESCR.

2 5 2 4 3 Water as a component of the right to housing

The CESCR in General Comment 15 further articulated the right to water as inextricably related to the right to adequate housing contained in article 11(1) of the ICESCR. The CESCR had earlier on adopted the same interpretative stance in its General Comment 4[124] adopted in 1991. In interpreting the right to housing enshrined in article 11(1) of the ICESCR, the CESCR in General Comment 4 on the right to adequate housing emphasised that beneficiaries of the right to adequate housing should have access to safe and adequate water.[125]

The former Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (hereafter referred to as the "Special Rapporteur on housing")[126] had similarly emphasised that water is a fundamental component of the right to adequate housing. The Special Rapporteur on housing pointed that "[n]o dwelling should be deprived of water because such deprivation

[122] The UN Commission on Human Rights appointed the Special Rapporteur on Health in Resolution 2002/31. The Special Rapporteur's mandate focused on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, as that right is reflected in, *inter alia*, the ICESCR and the CRC, as well as in article 25(1) of the UDHR. See UN Commission on Human Rights *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* (2002) UN Doc E/CN.4/2002/L.11.

[123] See UN Commission on Human Rights *Report of the Special Rapporteur of the Commission on Human Rights on the Right of Everyone to Enjoy the Highest Attainable Standard of Physical and Mental Health* (2003) UN Doc A/58/427 paras 51, 53(c) and (d).

[124] See UN Committee on Economic, Social and Cultural Rights *General Comment No 4 The Right to Adequate Housing* (1991) UN Doc E/1992/23 para 8(b).

[125] Para 8(b).

[126] The then UN Commission on Human Rights appointed the Special Rapporteur on Housing. The Special Rapporteur's mandate focused on adequate housing as a component of the right to an adequate standard of living as that right is reflected in, *inter alia*, the ICESCR and the CRC, as well as in article 25(1) of the UDHR. See UN Commission on Human Rights *Report of the Special Rapporteur on the Right to Housing* (2000) UN Doc E/CN.4/2000/L.11/Add.1.

would render it uninhabitable."[127] There is no doubt that access to safe and sufficient water is an essential component of adequate housing. According to the Special Rapporteur on housing, "water is not only an essential human need, but its place in human rights lies at the confluence of human rights and housing, health and food."[128]

2 5 2 4 4 Water as a component of the right to food

The ICESCR provides in article 11(1) and (2) for the right of everyone to adequate food, including the fundamental right to be free from hunger.[129] The CESCR has interpreted this provision by implying a right to water as a component of the right to food, noting that the right to water is inextricably related to the right to adequate food.[130] The UN Commission on Human Rights requested the former Special Rapporteur on the right to food (hereinafter referred to as Special Rapporteur on the right to food") to pay particular attention to the issue of drinking water given its interdependence with the right to food.[131] The Special Rapporteur on the right to food, in a subsequent report, asserted that the right to food includes not only the right to solid food, but also the right to liquid nourishment and drinking water.[132] Water is an integral part of the right to food, both as a requirement for food production and as food in itself.[133] Of particular concern is the right to water within agrarian societies, indigenous peoples and traditional societies. It is significant to recognise the significant role of water for traditional livelihoods, indigenous peoples and pastoralist communities where livestock is of great importance.[134] Such an approach is in

[127] See UN Commission on Human Rights *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living* (2002) UN Doc E/CN.4/2002. See also UN Commission on Human Rights *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Add. Mission to Peru* (2004) UN Doc E/CN.4/2004/48 arguing that "the right to adequate housing cannot be separated from the right to health, water and food" para 24.

[128] See UN Commission on Human Rights *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living Add: Visit to the Occupied Palestinian Territories* (2002) UN Doc E/CN.4/2003/5/Add.1 paras 47- 49.

[129] Article 11(1) and (2) of the ICESCR provides that "[t]he States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food...[and] recognising the fundamental right of everyone to be free from hunger."

[130] CESCR *General Comment No 4* (1991) para 8 (b).

[131] See UN Commission on Human Rights *The Right to Food* (2001) E/CN.4/Res/2001/25 para 9.

[132] UN Commission on Human Rights *The right to Food: Report of the Special Rapporteur on the Right To Food* (2000) E/CN.4/2001/53 para 32.

[133] Cahill 2005 *The International Journal of Human Rights* 396.

[134] The Food and Agriculture Organisation argued during the drafting of General Comment 15 that:

> The role of water for traditional livelihoods and the specific situation of pastoralists and people in societies where livestock is of overarching importance should be considered as a separate issue. In these contexts a sharp differentiation and different prioritisation of water for human

accordance with the interdependence and indivisibility of all human rights discussed above.

2 5 2 5 Deriving the right to water from the CRC, CEDAW and the Disability Convention

It was pointed earlier that the only explicit references to the right to water under the contemporary universal human rights instruments are in the CEDAW, CRC, and the Disability Convention. These instruments are limited *ratione personae* since they target specific groups in society, namely, women, children and the disabled persons respectively.[135] The above treaties address the situation of a particular part of the population, conferring specific protections and ensuring non-discrimination. As will be discussed below, the significance of these instruments lies in the fact that they explicitly provide for a right to water.[136] Additionally, it is possible to derive more extensive conclusions from the above instruments regarding the recognition of the right to water for everyone under a State's jurisdiction.[137]

The CEDAW sets out an agenda to end discrimination against women, and explicitly refers to the right to water for rural women. It obliges State parties to cater for the specific needs of rural women and to ensure them the "the right to enjoy adequate living conditions, particularly in relation to...water supply."[138] CEDAW does not create new rights but aims to proscribe discrimination against women in areas that are already protected pre-existing human rights treaties such as the international Bill of Rights. The fact that access to water is mentioned under article 14(2)(h) signifies that water is regarded as a component of one the rights already guaranteed

---

consumption and of water for food production does not reflect the peculiarities of pastoral systems. See Cahill 2005 *The International Journal of Human Rights* 396.

[135] See W Schreiber "Realising the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations" (2008) 48 *National Resources Journal* 431 440.

[136] The CEDAW has 186 ratifications and the CRC has 193 ratifications respectively as at 1st August 2012.The CRC is by far the most ratified treaty in the history of human rights instruments. The Disability Convention has a total of 147 signatories and 96 ratifications as at 1st August 2012, the highest number of signatories in the history of UN conventions on its opening day, and the first treaty to be open for ratification by regional integration organisations. It was adopted in December 2006 and entered into force in May 2008.

[137] See Winkler *The Human Right to Water* 60.

[138] Article 14(2)(h) of CEDAW provides:

> States parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right...[to]enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication.

– the right to an adequate standard of living.[139] These rights, including the right to water, are already guaranteed to all individuals as discussed above. The consideration of water supply addressing the situation of rural women is an indication that the problem of access to safe water is likely to be more pronounced for rural women than other urban women. Discrimination against rural women in access to safe water thus deserves special protection as reflected in article 14(2)(h) of CEDAW. It can be assumed that protecting water supply especially for rural women implies that the right of access to safe water is already extant in the human rights framework.[140]

The CRC is the mostly widely ratified universal human rights treaty and accords special protection to children.[141] The CRC explicitly provides for the right to drinking water for children. It states in article 24(2)(c) that "State Parties recognise the right of every child ...to clean drinking water."[142] Furthermore, article 27(1) recognises the right of every child to an adequate standard of living. The latter provision has been consistently interpreted by the Committee on the Rights of the Child to include access to clean drinking water.[143] Additionally, article 28 of the Disability Convention enjoins States to ensure disabled people and their families an adequate standard of living, similar to article 25 of the UDHR and article 11(1) of the ICESCR. As discussed above, the right to water has been derived from these provisions. Additionally, the Disability Convention explicitly provides for the right of equal access by persons with disabilities to clean water.[144] Article 28(2)(a) obliges

---

[139] See Winkler *The Human Right to Water* 61.

[140] 61.

[141] The United States of America and Somalia are the only countries that have not ratified the CRC.

[142] Article 24(1) &(2)(c) and (e) of the CRC provides that:

> States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health…States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures...to combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.

[143] See for example *Concluding Observations of the Committee on the Rights of the Child on Ethiopia* (2006) UN Doc CRC/C/ETH/CO/3 para 61.

[144] Article 28 on the right to an adequate standard of living and social protection provides that:

> 1. States Parties recognise the right of persons with disabilities to *an adequate standard of living for themselves and their families*, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realisation of this right without discrimination on the basis of disability.
>
> 2. States Parties recognise the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:
>
> (a) To ensure equal access by persons with disabilities to *clean water services*, and to ensure

States to "ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services."

What is of great significance with regard to these instruments is the lack of State reservations in regard to the particular provisions relating to the right to water. The lack of reservations in these human rights treaties in relation to the right to water clearly shows States' willingness to accept that there is a human right to water which must be protected and ensured.[145] CEDAW and CRC have to date received almost universal ratification by States: 187 States are parties to CEDAW while 193 States are parties to the CRC.[146]

2 5 2 6 Deriving right to water from right to life

The right to water has also been inferred from the right to life enshrined in article 6 of the ICCPR which recognises every human being's inherent right to life.[147] That raises the question whether the above provision can be considered to imply a right of access to life-sustaining supplies of adequate and safe water the realisation of which State parties are obliged to respect, protect and fulfil.[148] The basis of such an inference is that it is impossible to sustain life without water.[149] In his commentary on the ICCPR, Manfred Novak described the right to life as the "supreme human right."[150] Some scholars have even argued that article 6 has become part of customary law, while others even declared that it has become a norm of *jus cogens*.[151] Novak asserts that the special status of article 6 of the ICCPR is underlined by both its formulation in the treaty. He points out that the right to life is the first substantive right to be listed in the ICCPR; secondly, it is the only right in the ICCPR that is qualified by the adjective "inherent"; and thirdly, it is one of only three rights in which the declaratory present tense "has" rather than "shall have" was used.[152] Additionally, article 4(2) of ICCPR lists the right to life as one of the rights

---

access to appropriate and affordable services, devices and other assistance for disability-related needs (emphasis added).

[145] See Screiber 2008 *National Resources Journal* 440.

[146] As of 23 August 2012, CEDAW had 187 ratifications, and the CRC 193 ratifications. See UN Office of the High Commissioner for Human Rights Ratification Status of International Human Rights Treaties < http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx > (accessed 23.11.2012).

[147] Kiefer & Brolmann 2005 *Non-State Actors and International Law* 186.

[148] 185-188.

[149] See McCaffrey 1992-1993 *The Georgetown International Environmental Law Review* 10.

[150] M Novak *UN Covenant on Civil and Political Rights* (1993) 104.

[151] Kiefer & Brolmann 2005 Non-*State Actors and International Law* 186.

[152] Novak *UN Covenant on Civil and Political Rights* 104.

from which no derogation is permitted, even in times of public emergency that threatens the life of a nation.[153]

It must be pointed that such a broad conception of the right to life has been questioned. Dinstein advocates for a restrictive interpretation of article 6 of ICCPR. While he concedes that "human beings need certain essentials - particularly food, clothing, housing and medical care in order to remain alive," he argues that these are ingredients of the social right to an adequate standard of living recognised under the ICESCR.[154] Dinstein argued that the human right to life under the ICCPR is a civil right only and does not guarantee anyone against death from famine or cold or lack of medical attention.[155] The argument is that article 6 does not require a State to take positive steps to provide people access to life-sustaining resources such as potable water. Rather, the scope of the right is limited to the State obligation to refrain from arbitrary deprivation of life.[156] If one is to agree with Dinstein's interpretation of article 6, a positive right to access water for personal and domestic uses could hardly be derived from that provision.[157]

The contemporary approach from international lawyers and human rights scholars is to expand the right of life under article 6 of ICCPR. Understanding the right to life in this sense entails, not only protection against any arbitrary deprivation of life. It also means States are also under an obligation to pursue policies that are designed to ensure access to the means of survival for all people within their territories. Such an expansive view of the right to life finds favour with a number of notable scholars. Gleick for instance points that the right to life implies the right to fundamental conditions necessary to support life.[158] McCaffrey points to the contemporary trend towards an expansive interpretation of article 6 of ICCPR. McCaffrey cites as an example the UN Human Rights Committee's assertion that the right to life as the most fundamental right and may not be understood in a restrictive

[153] Kiefer & Brolmann *Non-State Actors and International Law* 186.
[154] See Y Dinstein "The Right to Life, Physical Integrity, and Liberty" in L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 114 115.
[155] 137.
[156] 114-137.
[157] AAC Trindade "The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change" in EB Weiss (ed) *Environmental Change and International Law: New Challenges and Dimensions* (1992) 244 272.
[158] Gleick 1998 *Water Policy* 493.

sense.[159] In its General Comment 6 on the right to life, the Human Rights Committee stated that:

> "[T]he right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot be properly understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."[160]

McCaffrey has argued that protection of the right to life requires States to adopt positive measures to protect life. This encompasses access to safe water for personal and domestic uses to prevent hunger, dehydration and water-related diseases.[161]

State practice also reflects this contemporary understanding of the right to life. The jurisprudence from the Indian courts provides a good example. The Indian constitution does not provide for an explicit right of access to water. The Indian Supreme Court has however interpreted the right to life under article 21 of the Indian Constitution to encompass the right of access to water.[162] Liebenberg has illustrated how the Indian Supreme Court has drawn on from the non-justiciable Directive Principles in part IV of the Indian Constitution to infuse the right to life with substantive content. This has resulted in the court interpreting the right to life to encapsulate basic survival needs such as adequate nutrition, clothing, right to livelihood, shelter, healthcare and the right to education.[163] The Indian Supreme Court stated in the case of *Narmada Bachao Andolan* that "[w]ater is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in [a]rticle 21 of the Constitution of India."[164] Values and interests underlying socio-economic rights, such as the right of access to water, has led to

---

[159] McCaffrey 1992-1993 *The Georgetown International Environmental Law Review* 9.
[160] See UN Human Rights Committee *General Comment No 6 The Right to Life* (1994) UN Doc HRI/GEN/1/Rev.1para 5.
[161] McCaffrey 1992-1993 *The Georgetown International Environmental Law Review* 10.
[162] See Constitution of India (1949). Article 21 provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."
[163] S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 122.
[164] *Narmada Bachao Andolan* v *Union of India* 2000 (10) SCC 664; *Subhash Kumar* v *State of Bihar* 1991 SC 420.

their protection through civil and political rights, particularly in those jurisdictions where there are no express socio-economic rights provisions.[165]

This dissertation will thus adopt this expansive understanding of the right to life as incorporating the right to water. The above interpretation of the right to life as encompassing the right to water is consistent with Scott's understanding of the interdependent and interrelated nature of human rights. There is an interrelated interdependence between the right to water and the right to life as life cannot be guaranteed in the absence of access to safe water. This interrelatedness of human rights means that the protection of human rights can only be conceived of and acted upon in an integrated fashion.[166]

2 5 2 7 Conclusion

The CESCR in General Comment 15 used three methods of deriving the right to access to water from contemporary international law. Firstly, General Comment 15 recognised the right to water through derivation and inferences from articles 11 and 12 in the ICESCR as pointed above. Secondly, it derived the right to water through an analysis of the centrality and necessity of water to other rights under the ICESCR and the other instruments under the International Bill of Rights. A pertinent example, is the derivation of water as an essential component of the right to life enshrined in the ICCPR. Thirdly, the CESCR in General Comment 15 also recognised the right to water as a right that already exists and recognised under various other international legal instruments. Through these three analytical models, the CESCR provided a solid legal basis for recognising a human right to water under international human rights law.[167] Jurisprudence from regional and national courts as well as legal scholars have thrown their weight behind the CESCR's derivation of the right to water from international human rights instruments using the above analytic device as legally permissible and non-revisionist.

The discussion above clearly illustrates the practical application of the concept of the interrelatedness and interdependence of all human rights. There is little doubt

[165] See Liebenberg *Socio-Economic Rights* 121-122.
[166] AAC Trindade "The Interdependence of all Human Rights-Obstacles and Challenges to their Implementation" (2002) 50 *International Social Science Journal* 513 515. As Nickel points out that "[s]ystem-wide indivisibility might be defended on the grounds that if all human rights are derived from a single value, such as human dignity, the result will be that all the families of human rights will have a strong form of unity akin to indivisibility."[166]
[167] 55-60.

that the right to water is indivisibly linked to the inherent dignity of the human person and is indispensable for the realisation of other human rights. By following such an approach, the CESCR in General Comment 15 has emphasised the importance of access to water as an integral component of the rights to health, adequate standard of living, food and life.

The above approach of deriving the right to water from related rights such as the right to life is in harmony with the purposes and values underlying human rights. Human rights constitute a mechanism to protect and advance certain values. Human rights are thus not just abstract concepts but social practises to realise those values.[168] The most important value underlying human rights is human dignity.[169] Jack Donelly conceives of human rights as a "road map and set of practices for constructing a life of dignity."[170] Asborn Eide emphasised the significance of human dignity as an animating value underpinning the push for the recognition, protection and promotion of all human rights.[171] The full realisation of all human rights, including the right to water, requires an understanding of the symbiotic relationship between all human rights. This is because human rights are deeply interconnected and cannot be realised in an isolated manner. Conceiving of human rights in an interdependent manner works as a bulwark against a fragmented conception of human rights.

Access to safe water is essential for the realisation of other human rights protected under the ICESCR and the ICCPR. Water is an underlying determinant of the rights to housing, health, life, food and an adequate standard of living. Significantly, as shown in this section, access to water has also been guaranteed in other human rights instruments such as CEDAW, CRC and the Disabilities Convention although the personal scope of these treaties is limited. Some of these treaties such as the CRC, CEDAW and the Disabilities Convention have been ratified by a significant number of States. The ICESCR and the ICCPR have also been widely ratified, and taken collectively, the right to water should be considered an independent human right. The following section explores the recognition of the right to water under other international treaties outside the realm of human rights.

---

[168] J Donelly *Human Rights and Dignity*. Paper Commissioned by and prepared for the Geneva Academy of International Humanitarian Law and Human Rights in the framework of the Swiss Initiative to commemorate the 60th Anniversary of the Universal Declaration of Human Rights (2009) <www.udhr60.ch> (accessed on 09.02.2011)13.

[169] 13.

[170] 13.

[171] A Eide "Economic, Social and Cultural Rights as Human Rights" in A Eide & A Rosas (eds) *Economic Social and Cultural Rights: A Textbook* (2001) 9 and 12.

2 5 3 Recognition of the importance of access to water in other international treaties

International humanitarian law encapsulated in the Geneva Conventions stipulates obligations that relate to access to water.[172] Although reference to water under the Geneva Conventions is not necessarily tantamount to its recognition as a human right, the guarantees regarding access to water underline its importance to sustain human life and dignity. The Geneva Conventions set out obligations to respect and ensure access to water for specified groups such as prisoners of war and interned persons.[173] They also contain similar provisions with regard to the protection of civilian persons.[174] Additional Protocols I and II to the Geneva Conventions also prohibit warring parties from attacking or destroying objects indispensable to the survival of the civilian population including drinking water supplies.[175]

The 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses (hereinafter referred to as the "Watercourses Convention") enjoins States to prevent the causing of significant harm to other watercourse States although it does not directly address the issue of a human right to

---

[172] See Geneva Convention Relative to the Treatment of Prisoners of War (1949) 75 UNTS 135. Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949) 75 UNTS 85 & Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) 75 UNTS 31.

[173] Article 20 of the Convention Relative to the Treatment of Prisoners of War provides that:

> The detaining Power shall supply the prisoners of war who are being evacuated with sufficient food and *portable water*, and with the necessary clothing and medical attention (emphasis added).

Article 85 provides, in relevant part:

> Internees...shall be provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry; installations and facilities necessary for this purpose shall be granted to them. Showers or baths shall also be available. The necessary time shall be set aside for washing and for cleaning.

Article 89 states that:

> Internees shall also be given the means by which they can prepare for themselves any additional food in their possession. Sufficient drinking water shall be supplied to internees.

Article 127 states that:

> The Detaining Power shall supply internees during transfer with drinking water and food sufficient in quantity, quality and variety to maintain them in good health, and also with the necessary clothing, adequate shelter and the necessary medical attention.

[174] See Articles 27, 88 and 89 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949). See also article 54(2) of Protocol. Article 54(2) states that:

> It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock and drinking water installations.

[175] Protocol II in article 5(1)(b) enjoins State parties to ensure that interned, detained, wounded and sick persons are "to the same extent as the local civilian population, be provided with food and drinking water." Article 14 has a similar provision as in the Protocol 1 cited above and proscribes the deliberate destruction of "objects indispensable to the survival of the civilian population such as …drinking water installations and supplies."

water.[176] The Watercourses Convention enjoins States to pay special regard to the requirements of vital human needs in the event of conflict on the uses of an international watercourse. The Statement of Understanding issued by States negotiating the Watercourses Convention explained that:

> "In determining 'vital human needs', special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation."[177]

The Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, for example, requires States to take all appropriate measures to ensure adequate supplies of potable water for everyone.[178] The Rome Statute of the International Criminal Court (hereinafter referred to as the "Rome Statute") defines war crimes as the intentional use of "starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions."[179] This would encompass such acts as the deprivation of water supply to civilians as a means of warfare. The inclusion of water as an object indispensable to the survival of the civilian population under the Geneva Conventions and the Rome Statute emphasises the importance of water for which access should be protected even in war situations.

The human right to water is increasingly being recognised in regional agreements. Specific human rights treaties in Africa, Europe and the Americas explicitly or implicitly provide for the right to water. The following section examines the extent to which the right to water has been recognised in regional instruments.

---

[176] See United Nations Convention on the Law of Non-Navigational Uses of International Watercourses (1997) UN Doc A/51/869. *See* Article 7 on *Obligation not to cause significant harm* provides that "Watercourse States shall, in utilising an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States."

[177] See *Report of the Sixth Committee convening as the Working Group of the Whole* (1997) UN Doc A/51/869 para 8.

[178] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1999) EUR/ICP/EHCO 020205/8Fin articles 4(2)(a) & 6(1)(a).

[179] See Rome Statute of the International Criminal Court (1998) 2187 UNTS 90. Article 8 (2)(xxv) defines "war crimes" as "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions."

2 5 4 Recognition of the right to water under regional instruments

2 5 4 1 Africa

The African Charter on Human and Peoples' Rights (hereafter referred to as the "African Charter")[180] is distinctive in its attempt to append an "African fingerprint" on the human rights discourse.[181] It is the only regional human rights instrument that recognises economic and social rights on the same footing as civil and political rights in the same text. The preamble to the African Charter endorses the indivisibility and interrelatedness of all human rights by declaring that "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as their universality."[182] The African Charter contains an enforcement mechanism for all human rights recognised in its text and the African Commission, as will be shown below, has adopted an approach to interpreting the African Charter in a way that endorses the indivisibility and interdependence of all human rights.[183]

The African Charter explicitly recognises a number of socio-economic rights. These include the right to property,[184] the right to work,[185] the right to health[186] and the right to education.[187] The African Charter recognises the right of every individual to the best attainable state of physical and mental health,[188] and guarantees all peoples the right to a satisfactory environment favourable to their development.[189] The right to life is also protected in the African Charter. This is also an important provision with regard to the protection of the right to water as a derivative of the right to life.[190]

---

[180] See African Charter on Human and People's Rights (1981) OAU Doc CAB/LEG/67/rev.5.
[181] See M Mutua "The Banjul Charter and the African Fingerprint: An Evaluation of the Language of Duties" (1995) 35 *Virginia Journal of International Law* 339 339. For an analysis of the African human rights system and the latest jurisprudence on economic and social rights see DM Chirwa "African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 323 324.
[182] See para 8 of the preamble to the African Charter.
[183] Chirwa "African Regional Human Rights System" in *Social Rights Jurisprudence* 324.
[184] Article 14 of the African Charter.
[185] Article 15.
[186] Article 16(1).
[187] Article 17(1).
[188] Article 16.
[189] Article 18.
[190] Article 4 of the African Charter provides that "[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

The African Commission has derived from the African Charter some socio-economic rights not specifically provided for in that instrument. These include the rights to social security, adequate housing, adequate standard of living, adequate food and social security. Commentators have argued that the right to water can thus be inferred from the above provisions as such guarantees are unattainable without access to water.[191]

The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights (hereinafter referred to as "Guidelines") note that although the African Charter does not explicitly refer to a right to water, the right to water is implied in a number of provisions.[192] These include the protections of the right to life, the right to dignity, the right to work, the right to health, the right to economic, social and cultural development and the right to a satisfactory environment contained in the African Charter.[193] A discussion of the jurisprudence of the African Commission below will reveal how the African Commission has underscored the interrelatedness and indivisibility of all rights thereby engendering a holistic development of the African Charter.[194]

In Africa, most States are party to the African Charter on the Rights and Welfare of the Child.[195] The African Charter on the Rights and Welfare of the Child is one of the regional human rights instruments that include explicit provisions concerning the right to water. Article 14(2)(c) guarantees to every child the right to enjoy the best attainable state of physical, mental health safe drinking water.[196]

---

[191] See Petrova 2006 *Brooklyn Journal of International Law* 557.

[192] See section III(I) of the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights (2011) adopted by the African Commission on Human and People's Rights on 24th October 2011 (hereinafter the "Guidelines") <http://caselaw.ihrda.org/doc/ecosoc_gview/> (accessed 20.04.2010). The Guidelines were developed by the African Commission Working Group on Economic, Social and Cultural Rights [check name] created in 2004. The mandate of the working group was to develop principles and guidelines on economic, social and cultural rights (ESCRs), elaborate guidelines pertaining to ESCRs for State reporting as well as undertake studies and research on specific ESCRs. The Guidelines are intended to provide detailed guidance to States on their drafting of development policies and human rights reports regarding the implementation of ESCRs. They are further intended to give national, regional and international civil society, as well as monitoring bodies benchmarks against which to assess national policies.

[193] See section III(I).

[194] Chirwa "African Regional Human Rights System" in *Social Rights Jurisprudence* 324.

[195] African Charter on the Rights and Welfare of the Child (1990) CAB/LEG/24.9/49.

[196] Article 14(2)(c) of the African Charter on the Rights and Welfare of the Child states that:

> Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health...State Parties...undertake to pursue the full implementation of this right and...shall take measures...to ensure the provision of adequate nutrition and safe drinking water.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter "Protocol on African Women") has also been cited to support the existence of a right to water in international law as it provides for women's right of access to water.[197] Article 15 of the Protocol on African Women enjoins States to ensure women access to clean drinking water. This constitutes an endorsement of the importance of the right of access to water as it is enshrined in a legally binding instrument.[198] The Protocol on African Women further enjoins States to provide budgetary support for the actualisation of the rights guaranteed in the treaty. Of great importance for the realisation of the right to access to water by women in Africa is article 26 which provides that must implement the treaty at national level, and indicate the legislative and other measures undertaken for the full realisation of the protected right. Article 26 further enjoins States to provide budgetary and other resources for the full and effective implementation of the guaranteed rights.

The above provisions oblige States to take positive steps to advance the realisation of the rights contained in the Protocol on African Women, including the right to water. States are also enjoined to adopt measures to assist individuals and communities to access the various rights provided for in the Protocol on African Women, including the right to access water. It is important to note that the Protocol on African Women has a sound monitoring mechanisms in the form of the African Commission on Human and People's Rights (hereinafter referred to as the "African Commission"), the African Court on Human and People's Rights,[199] pending the

[197] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2000) CAB/LEG/66.6 (hereinafter "Protocol on African Women)." Article 15 provides that "States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to ensure...women with access to clean drinking water."

[198] The Protocol on African Women was adopted in July 2003. One observer commented that "the speed with which the Protocol on African Women was ratified broke all records for the ratification of continental human rights in Africa." See I Houghton "Reviewing the Protocol on the Rights of Women in Africa" *Pambazuka News* (26 May 2006) <http://www.newsafrica.org/new> (accessed 24.06.2010).

[199] The African Court on Human and People's Rights (ACHPR) was established in 1998 through the Protocol to the Charter on the Establishment of the African Court on Human and Peoples' Rights (1998) OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III). The Protocol establishing the ACHPR entered into force on January 1, 2004 upon its ratification by fifteen member States to the African Charter. The ACHPR has the competence to take final and binding decisions on human rights violations perpetrated by African Union member States. The court has jurisdiction over all cases and disputes submitted to it regarding the interpretation and application of the African Charter, the Protocol to the Charter on the Establishment of the African Court on Human and Peoples' Rights and any other relevant human rights instrument ratified by States that are party to a case. The African Court of Justice and the African Court on Human and Peoples' Rights were merged by virtue of the Protocol on the Statute of the African Court of Justice and Human Rights in 2008 to form a single court, the African Court of Justice and Human Rights. Adopted on the 1 July 2008, the Protocol on the Statute of the

coming into effect of the protocol that creates the African Court of Justice and Human Rights in Africa (hereinafter referred to as the "African Court of Justice and Human Rights.")[200] The African Court of Justice and Human Rights will have within its mandate the enforcement of the human right to water. This is because the African Court of Justice will have jurisdiction over the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol on African Women among others.[201]

The above discussion clearly shows that the right of access to water is a fundamental value within the African human rights system given that it is one of the rights that would be subject to monitoring by a fully-fledged judicial mechanism. The African Commission has adopted an approach to interpreting the African Charter in a way that reinforces the concept of interdependence of human rights. Chirwa has pointed out that when considering communications brought before it, the African Commission considers the facts in the light of all relevant rights applicable.[202] In the case of *The Social and Economic Rights Centre & the Centre for Economic and Social Rights v Nigeria*,[203] for instance, the communication alleged that a consortium comprising the State-owned Nigerian Petroleum Company and Shell Petroleum Development Company had committed a range of human rights violations. It was alleged that the consortium had exploited oil resources in Ogoniland, Nigeria, without due regard for the health or environment of the local communities. This resulted in water, soil and air pollution causing serious health problems for the local communities. The African Commission found Nigeria to be in violation of a range of civil, economic, social and political rights. These included the right not to be discriminated against, the rights to life, property, health, family protection, satisfactory

---

African Court of Justice and Human Rights merges the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into one single court. The Protocol on the African Court of Justice and Human Rights, thus, replaces the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted in 1998) and the Protocol of the Court of Justice of the African Union (adopted in 2003). The Protocol on the African Court of Justice and Human Rights, currently not yet into force, will enter into force upon ratification by fifteen member States to the African Union. As of 14 August 2012 the Protocol on the African Court of Justice and Human Rights had a total of 5 ratifications. For a list of ratifications see <http://au.int/en/treaties> (accessed 23.11.2012).

[200] See Protocol on African Women, article 32 which provides that:

> Pending the establishment of the African Court [of Justice and Human Rights in Africa] the African Commission on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application and implementation of this Protocol.

[201] See Article 28 of the Protocol on the African Court of Justice and Human Rights.

[202] Chirwa "African Regional Human Rights System" in *Social Rights Jurisprudence* 324.

[203] *The Social and Economic Rights Centre & the Centre for Economic and Social Rights v Nigeria* Communication 155/96, Ref.ACHPR/COMM/A044/1 (27 May 2002).

environment and the right of peoples to freely dispose of their wealth.[204] The significance of the African Commission's finding is that it derived the rights to food and housing from a range of other rights in the African Charter thus explicitly endorsing the organic and related interdependence of all human rights. This supports the interdependence of human rights approach to derive the right to water from related rights such as health, food, water and housing.

In the case of *Free Legal Assistance Group and others v Zaire,*[205] the petitioners made numerous allegations of human rights violations against the State. These ranged from arbitrary arrests, detention, torture and religious persecution, to the shortage of medicines and the failure of the government to provide basic services such as safe drinking water. The African Commission ruled that article 16 of the African Charter which provides for every individual's right to enjoy the best attainable state of physical and mental health had been violated. The African Commission further ruled that the failure by the State to provide basic services such as safe drinking water was also a violation of article 16.[206]

In its recent decision in the case of *Centre on Housing Rights and Evictions (COHRE) v Sudan*, the African Commission found Sudan to have violated a number of rights provided in the African Charter, including the right to water.[207] The African Commission ruled that the poisoning of water sources was a violation of the right to water implicit in article 16 of the African Charter as it exposed the victims to serious health risks.[208] The African Commission's derivation of the right of access to safe drinking water from the right to health is an endorsement of the interrelated and interdependent nature of human rights. It further endorses the argument advanced above that the right to water is a cardinal component of the right to health.

Other instruments adopted under the African system such as the revised African Convention on the Conservation of Nature and Natural Resources, although not yet in force, explicitly provides for the member States to guarantee a continuous supply of suitable water.[209] The 2002 Senegal River Water Charter, a treaty

---

[204] See an analysis of the decision in Chirwa "African Regional Human Rights System" in *Social Rights Jurisprudence* (2008) 324-326.
[205] *Free Legal Assistance Group and others v Zaire* Communications 25/89, decision made at the 18th Ordinary Session (October 1995).
[206] See para 47.
[207] See *Centre on Housing Rights and Evictions (COHRE) v Sudan* Communication 296/2005.
[208] Para 212.
[209] See The African Convention on the Conservation of Nature and Natural Resources (Revised Version (2003). Article 7(2) provides that:

concluded between Mali, Mauritania and Senegal, also aims to ensure (amongst other objectives), access to "the fundamental right to healthy water" for the populations of the riparian States.[210]

2 5 4 2 Americas

The Inter-American system for the protection of human rights has a number of human rights instruments. The significant ones include the American Declaration of the Rights and Duties of Man (hereafter referred to as "the American Declaration")[211] and the American Convention on Human Rights (hereafter referred to as "the American Convention"),[212] the Protocol to the American Convention on Human Rights on the Abolition of the Death Penalty and[213] the Inter-American Convention to Prevent and Punish Torture.[214] Others such as the Inter-American Convention on Forced Disappearance of Persons,[215] the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women,[216] and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (hereafter referred to as the "Protocol of San Salvador") are equally important.[217]

The American Declaration provides a full spectrum of socio-economic rights as well as civil and political rights. The socio-economic rights include the right to protection for maternity and childhood,[218] the right to health,[219] the right to

---

> The Parties shall establish and implement policies for the planning, conservation, management, utilisation and development of underground and surface water, as well as the harvesting and use of rain water, and shall endeavour to guarantee for their populations a sufficient and continuous supply of suitable water.

[210] Senegal River Water Charter (2002) concluded between Mali, Mauritania and Senegal in May 2002. French original version <http://www.lexana.org/traites/omvs_200205.pdf> (accessed 11.10.2010). Article 4(3) provides that:

> The guiding principles governing every distribution of the water of the River [Senegal] aim to ensure the full use of the resource for the populations of the riparian States, while respecting the safety of people and works, as well as the fundamental human right to healthy water, in the perspective of sustainable development.

[211] American Declaration of the Rights and Duties of Man (1948) OAS Res XXX.
[212] American Convention on Human Rights (1969) 1144 UNTS 123.
[213] Protocol to the American Convention on Human Rights on the Abolition of the Death Penalty (1990) OEA/Ser.L.V/II.82 doc.6 rev.1.
[214] Inter-American Convention to Prevent and Punish Torture (1985) OEA/Ser.L.V/II.82 doc 6 rev.1.
[215] Inter-American Convention on Forced Disappearance of Persons (1994) 33 ILM1429.
[216] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994) 33 ILM 1534.
[217] The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) 33 ILM 1429.
[218] American Declaration, article 7.
[219] Article 11.

education,[220] the right to culture,[221] the right to employment and fair remuneration,[222] the right to rest and leisure.[223] The other protected rights include the right to housing,[224] the right to property,[225] the right to special protection for mothers, children and the family,[226] and the right to social security.[227]

The American Convention recognises an extensive catalogue of civil and political rights but does not explicitly provide for economic, social and cultural rights. These include the rights to adequate food, housing, health, social security, education, unionisation, employment, just labour conditions and to social security.[228] Melish has however noted that the American Convention's provisions provide the Inter-American Court with the necessary arsenal for the judicial protection of socio-economic rights.[229] The Inter-American Court of Human and People's Rights (hereafter referred to as "the Inter American Court") has affirmed that socio-economic rights are the same in substance as civil and political rights as they all derive from the dignity of the person.[230] The Inter-American Court has relied on the rights enshrined in chapter II of the American Convention to protect socio-economic rights such as health, education and social security.[231] The American Convention also protects the rights to life, personal integrity, legal personality, special protection for children and the family as well as inviolability of the home.[232] These latter provisions are important, particularly with regard to the protection of economic and social rights including the right to water. The Inter-American Court, as will be shown below, has addressed essential aspects of the right to water, health, education, food, recreation, sanitation and adequate housing all of which are important for a dignified life under the rights to life and personal integrity.[233]

---

[220] Article 12.
[221] Article 13.
[222] Article 14.
[223] Article 15.
[224] Articles 9 and 11.
[225] Article 23.
[226] Articles 6 and 7.
[227] Article 16.
[228] These rights are guaranteed under article 26 of the American Convention.
[229] See TJ Melish "The Inter-American Court of Human Rights: Beyond Progressivity" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 372 374.
[230] See Inter-American Court on Human Rights Annual Report of the Inter-American Court of Human Rights (1986) OEA/Ser.LIII.15 para 14.
[231] See Melish "The Inter-American Court of Human Rights" in *Social Rights Jurisprudence* 375.
[232] See American Convention, articles 4 and 5.
[233] See Melish "The Inter-American Court of Human Rights" *Social Rights Jurisprudence* 374.

The protocol of San Salvador incorporates a catalogue of detailed and well-defined socio-economic rights. These include the rights to health and a healthy environment, food, education, work, just and equitable conditions of work, social security, benefits of culture and special protection of family, children, the elderly and persons with disabilities.[234] The Protocol of San Salvador entitles everyone to the right to live in a healthy environment and to have access to basic public services.[235] This provision has been interpreted to encompass a right to water.[236] The right of access to water is a vital component of a healthy environment. Lack of access to safe water, as illustrated in chapter 1, is one of the major causes of ill health and mortality. The right to a healthy environment necessarily incorporates the right to access safe water.

The Inter-American Court has also affirmed the interdependence of all human rights discussed above. The court asserted that economic, social and cultural rights are the same in substance as civil and political rights.[237] The Inter-American Court explained that all categories of rights derive from the essential dignity of human beings.[238] In the *Case of Children's Rehabilitation v Paraguay* (hereinafter referred to as "*Street Children*") the Inter-American Court interpreted the right to life in the American Convention as including the right not to be prevented from having access to the conditions that guarantee a dignified existence.[239] In *Legal Status and Human Rights of the Child case*, the Inter-American Court also expansively interpreted the right to life in the American Convention as including, for children, the obligations to provide the measures required for life to develop under conditions of dignity. [240]

The Inter-American Court has particularly highlighted healthcare for children as one of the key pillars to ensure the enjoyment of a decent life by children.[241] In *Yakye Axa Indigenous Community v Paraguay*,[242] the Inter-American Court held that the State had failed to take positive measures with respect to conditions that limited the community members' possibilities of living a dignified life. The State was, therefore, held to have violated the right to life in the American Convention. Citing the

[234] See Protocol of San Salvador, articles 6-18.
[235] Article 11.
[236] COHRE *Manual on Right to Water and Sanitation* (2008) <http://www.cohre.org> (accessed 26-02-2010).
[237] See *Annual Report of the Inter-American Court of Human Rights* (1986) 44-45 para 14.
[238] Para 14.
[239] *Case of Children's Rehabilitation v Paraguay* 2004 (Ser.C) No 112 para 144.
[240] *Legal Status and Human Rights of the Child* 2002 OC-17/02/Ser.A No 17 para 80.
[241] Para 86.
[242] *Yakye Axa Indigenous Community v Paraguay* 2005 Ser/C No 125 para 82.

CESCR's General Comments Numbers 12, 14 and 15 (on the rights to food, health and water, respectively), the Inter-American Court emphasised the very close nexus between access by indigenous people to their ancestral lands and enjoyment of their rights to clean water, food, health, education and cultural identity.[243] The Inter-American Court further asserted that the State's obligation to protect the right to life necessitates it to ensure the minimum conditions of life compatible with human dignity. This requires the State to adopt positive concrete measures oriented to upholding the right to a dignified life.[244] The court particularly underscored the State's obligations to guarantee the rights to adequate food, access to clean water and health.[245]

The interdependence and indivisibility of all human rights implies that, under the Inter-American human rights system, the right to access water can be enforced through a number of provisions. These include the express provisions relating to the rights to adequate health, food and housing. Some of the cases highlighted above, for instance the *Yakye Axa Indigenous Community v Paraguay* case, clearly illustrate and reflect a broad understanding of the right to health. This right does not just encompass access to medical care in the narrow sense, but also access to the underlying determinants of health such as access to clean water. The same can be said of the rights to adequate food and housing.

The Inter-American Court has also expanded the right to life as a right to a dignified life or to a life project. This approach, as illustrated in the jurisprudence of the Inter-American Court, is "illimitable in scope, capable of subsuming into their protective embrace all nationally and internationally recognised human rights."[246] The right to life encapsulated in the American Convention has thus been interpreted to encompass a diverse array of socio-economic rights including access to safe and potable water, housing, decent healthcare and adequate food as illustrated above.[247]

[243] Paras 72-73.
[244] Para 68.
[245] Para 78.
[246] Melish "The Inter-American Court of Human Rights" in *Social Rights Jurisprudence* 407.
[247] 407.

2 5 4 3 Europe

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as the "ECHR"),[248] is the pre-eminent human rights instrument under the Council of Europe, focuses almost entirely on the traditional canon of civil and political rights.[249] The ECHR contains no unqualified provisions obliging member States to provide core socio-economic rights such as the right to adequate health, social security or water. It provides protection for respect of one's private and family life, home and correspondence but does not contain an obligation to ensure or provide housing.[250] The First Protocol to the ECHR provides for explicit socio-economic rights through its protection of the rights to property and education respectively.[251]

It is noteworthy that as long ago as 1979 in *Airey* v *Ireland* (hereinafter referred to as the "*Airey case*"),[252] the European Court of Human Rights (hereafter referred to as the "ECtHR") recognised an overlap in the ECHR between civil and political rights, on the one hand, and socio-economic rights, on the other, a view that is now immanent in its jurisprudence.[253] The ECtHR specifically stated that:

> "[T]he mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention."

The ECtHR has built a body of socio-economic rights jurisprudence through an incremental interpretation of the traditional civil and political rights in articles 2, 3 and 8 and articles 6 and 14 of the ECHR.[254] Since the *Airey case*, the ECtHR has

---

[248] Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ETS 5/213 UNTS 222 (hereinafter "ECHR").
[249] See generally E Palmer "Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights" (2009) 2 *Erasmus Law Review* 397-425.
[250] See article 8(1) of the ECHR.
[251] Articles 1 and 2 of the First Protocol concern, respectively, the right to property and the right to education.
[252] See *Airey* v *Ireland* A.32 (1979) 2 EHRR 305 para 26.
[253] *Stec* v *United Kingdom* Admissibility decision (2005) 41 EHRR SE 18 para 52.
[254] ECHR article 2 provides for respect of the right to life, article 3 is a prohibition against torture, inhuman and degrading treatment or punishment, article 8 provides for respect for private and family life, home and correspondence and article 6 enshrines the right to a fair public hearing. For a comprehensive discussion on the development of positive obligations under the ECHR, see generally

engaged in expansive interpretations of the substantive elements of article 8 (private and family life, home and correspondence) to support the development of a wide range of socio-economic benefits in a wide range of cases. Such a mechanism is used in cases characterised by severe socio-economic deprivation for which responsibility cannot be directly or indirectly imposed on the State. In such scenarios, the approach of the ECtHR has been to interpret the ECHR in such a way that it compels the State to provide socio-economic assistance by virtue of the positive obligation contained in article 1[255] of the ECHR read with articles 3 and 8. In *Dulas v Turkey*, for instance, the ECtHR held that the destruction of the applicants' homes and property constituted particularly grave and unjustified interferences with the applicants' respect for their private and family lives and homes under article 8 and the right to property under article 1 of Protocol 1 to the ECHR. The ECtHR therefore imposed a positive duty on the State to provide housing to the applicants.[256] Furthermore, the ECtHR has in some cases indicated its readiness to impose positive obligations on State parties in cases involving the protection of the environment, child protection and public health and welfare systems.[257]

The ECtHR has to date not explicitly derived the right to water from the provisions of the ECHR. However, there is little doubt that the right to water can be derived from an expansive and principled interpretation of the various provisions of the ECHR. It is virtually impossible to enjoy the right to life, to be free from inhuman and degrading conditions without access to safe water. The indivisibility and interdependence of all human rights entails a rejection of the overly simplistic taxonomy of catagorising rights as either social and economic or civil and political.[258]

In Europe, several States are party to the European Social Charter which implicitly recognises the right to water.[259] The revised European Social Charter also

---

A Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

[255] Article 1 of the ECHR provides for the State parties to secure to everyone within their jurisdiction the rights and freedoms contained in that instrument.

[256] *Dulas v Turkey* (2001) *Application* no 25801/94.

[257] For an illuminating discussion the ECtHR's approach to the development of positive obligations encompassing the protection of economic and social rights under the rubric of the ECHR, see E Palmer "Protecting Socio-Economic Rights" (2009) *Erasmus Law Review* 397-425.

[258] See L Clements & A Simmons "European Court of Human Rights: Sympathetic Unease" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (2008) 409 409.

[259] European Social Charter (1965) ETS No 35. Article 11 enjoins member States to:

> take appropriate measures...to remove as far as possible the causes of ill-health...to provide advisory and educational facilities for the promotion of health and the encouragement of

recognises the right to housing, whereby States are enjoined to promote access to housing of an adequate standard.[260] The European Committee on Social Rights, a treaty body charged to monitor State compliance with the European Social Charter held in the case of *Defence for Children International v The Netherlands* that the right to clean water is a component of the right to adequate housing.[261] Such an interpretation is consonant with the discussion above on deriving the right to water as a component of the right to housing. Furthermore, it constitutes an endorsement of the related interdependence of rights articulated as a framework to derive the right to water from related rights.

The UN Commission in Europe (hereinafter referred to as "UNECE") adopted the London Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (hereinafter referred to as "UNECE London Protocol"). The UNECE London Protocol is the first regional international agreement of its kind adopted specifically to ensure an adequate supply of water for everyone and to protect water in a sustainable way. It specifically enjoins member States to ensure equitable access to water of acceptable quality and quantity to the entire population.[262] It also emphasises special regard to the disadvantaged and socially excluded groups in the supply of water.[263] Additionally, under the European System (hereinafter referred to as the "EU"), the

---

individual responsibility in matters of health...[and] to prevent as far as possible epidemic, endemic and other diseases.

[260] See article 31 of the Revised European Social Charter (1966) ETS No 163.

[261] See *Defence for Children International v The Netherlands* Complaint no 47/2008.

[262] Article 4.

[263] See Protocol on Water and Health to the Watercourses Convention. A number of provisions are supportive of the emergence of the right to water. These are:

Article 4 – General Provisions

1. The Parties shall take all appropriate measures to prevent, control and reduce water-related disease within a framework of integrated water-management systems aimed at sustainable use of water resources, ambient water quality which does not endanger human health, and protection of water ecosystems.
2. The Parties shall, in particular, take all appropriate measures for the purpose of ensuring:
   (a) Adequate supplies of wholesome drinking water which is free from any micro-organisms, parasites and substances which, owing to their numbers or concentration, constitute a potential danger to human health. This shall include the protection of water resources which are used as sources of drinking water, treatment of water and the establishment, improvement and maintenance of collective systems.

Article 5(1) provides that "[e]quitable access to water, adequate in terms both of quantity and of quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion". Article 6 provides that "[i]n order to achieve the objective of this Protocol, the Parties shall pursue the aims of access to drinking water for everyone."

European Parliament adopted a watershed resolution in 2003.[264] In that resolution, the EU affirmed that access to drinking water of a sufficient quality and quantity is a basic human right and enjoined national governments to fulfill this obligation.[265] The EU resolution on water further provides that distribution of water services should be looked upon as a public service. In that regard, public-private partnerships systems should be viewed as one of several ways of improving access to water rather than the panacea.[266]

2 5 4 4 Asia

The Asia-Pacific *Message from Bepu* Declaration, although not legally binding, was endorsed unanimously by heads of States and governments from the Asia-Pacific region.[267] It explicitly provides for people's right to safe drinking water by "[r]ecognis[ing] the people's right to safe drinking water...as a basic human right and a fundamental aspect of human security."[268] The signatory States further undertook to substantially increase resource allocations towards water.[269] This clearly shows that access to water is an important social value regarded as fundamental in a world of diverse value systems hence the high degree of international consensus on the need for it to be accessible.

2 5 4 5 Conclusion

The above section analysed the legal bases for the right to water under international law. The discussion has focused mainly on the primary instruments under the

[264] See European Parliament resolution on the Commission communication on water management in developing countries and priorities for EU development cooperation COM (2002) — 2002/2179(COS) (hereinafter referred to as "European Parliament resolution on water").
[265] See European Parliament resolution on water. The European Union Water Fund has also affirmed the right to water for all without discrimination, thereby giving impetus to the emergence and significance of the right to water. See European Union Water Fund <http://www.europa-eu-un.org/articles/en/article_2262_en.htm> (accessed on 11.10.2010). Article 23 specifically states that "access to water for all without discrimination is a right, and therefore [the EU] takes the view that appropriate measures must be taken to ensure that insolvent people are not deprived of such access."
[266] The European Union Water Fund further provides in para C that "access to water is essential for life, health, food, well-being and development and water cannot therefore be regarded as a mere commodity." Paragraph D(1) "reaffirms that access to drinking water in a sufficient quantity and of adequate quality is a basic human right and considers that national governments have a duty to fulfill this obligation."
[267] See Report of The Proceedings of the First Asia-Pacific Water Summit (2007) <http://www.worldwatercouncil.org/fileadmin/wwc/Programs/Right_to_Water/Pdf_doct/Message_from_Beppu_071204.pdf> (accessed 06.10.2010).
[268] First Asia-Pacific Water Summit (2007).
[269] First Asia-Pacific Water Summit (2007).

international human rights regime. The above section demonstrated that a human right to water is implicit in the provisions of the UDHR, ICESCR and the ICCPR. This is because water is necessary to meet the explicit rights to health, food, housing and an adequate standard of living contained in the these instruments. Significantly, this section demonstrated that a human right to water can also be inferred from the right to life. This is because a contemporary understanding of the right to water is not to conceive of such right only in a negative sense. The protection of the right to life requires States to adopt positive measures to protect life. This encompasses access to safe water for personal and domestic uses to prevent hunger, dehydration and water-related diseases.

The right to water is however explicitly enshrined under CEDAW, CRC, and the Disability Convention. This clearly shows that claims for the existence of a universal human right to access water are predicated on a sound legal base. A noteworthy development, highlighted above, is that the human right to water is now extant, not only under universal human rights instruments but also under regional treaties.

What comes out clearly from the above discussion is the practical application of the concept of the interrelatedness and interdependence of all human rights. This section demonstrated that the right to water is indivisibly linked to the inherent dignity of the human person and is indispensable for the realisation of other human rights. General Comment 15 on the right to water, the UN's standard-setting instrument in the elaboration on the right to water, also emphasised the importance of access to safe and adequate water as an integral component of the rights to health, adequate standard of living, housing, food and life.

Some scholars have also pointed that the right of access to water is emerging as a norm of customary international law. This view has been endorsed by scholars like Sanchez-Moreno and Higgins.[270] They point to the increasing recognition of the right to water at both the international and domestic levels as reflecting State practice pointing towards its emergence as a customary norm. In the following section I discuss and analyse this issue with a view to ascertaining whether the right to water can be said to be emerging as a rule of customary international law.

[270] McFarland Sanchez-Moreno & Higgins 2003-2004 *Fordham International Law Journal* 1728.

2 5 5 Customary International law

The question as to whether the right to water is part of customary international law is of great significance.[271] States that have not ratified human rights treaties in which the right to water is guaranteed could nevertheless be bound by a human right to water.[272] Customary international law is one of the primary forms of international law as provided in article 38(1)(b) of the Statute of the International Court of Justice.[273] The International Court of Justice is thus obliged to apply "[i]nternational custom, as evidence of a general practice accepted as law."[274] Goldsmith & Posner defined customary law as "the collection of international behavioural regularities that nations over time come to view as binding as a matter of law."[275] The International Law Association has defined a rule of customary international law as one that is "created and sustained by the constant and uniform practice of States in circumstances that give rise to the legitimate expectation of similar conduct in future."[276] It is a practice that States follow "not in blind pursuit of political approbation, but rather, because they believe they have a legal obligation to do so."[277]

The basic elements for the formation of customary law were judicially confirmed by the International Court of Justice in the case of *Nicaragua v the United States of America*.[278] Firstly, there must be a widespread and uniform State practice.[279] Evidence of State practice may be gathered from statements made by government spokespersons to parliament, at international conferences and at meetings of international organisations.[280] State practice may also be reflected through State constitutions, legislation, judicial decisions and regulations.[281] The *Restatement of the Foreign Relations Law of the United States* (hereinafter referred to as the "Restatement") for instance, asserts that the practice of States that builds customary law takes many forms and includes what States do in or through

[271] Winkler *The Human Right to Water* 65.
[272] 65.
[273] See article 38 of the Statute of the International Court of Justice (1945) <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (accessed 23.03.2010).
[274] See article 38.
[275] JL Goldsmith & EA Posner "A Theory of International Law" (1999) 66 *The University of Chicago Law Review* 1113-1116.
[276] See International Law Association <http://www.judicialmonitor.org/archive_1206/> (accessed 28.10.2010).
[277] See International Law Association.
[278] *Nicaragua v USA* (Merits) *ICJ Reports* 1986 *ICJ Reports* 97.
[279] MW Janis *An Introduction to International Law* (2003) 44.
[280] I Brownlie *Principles of Public International Law* (2003) 6.
[281] P Malanczuk *Akehurst's Modern Introduction to International Law* (2005) 39.

international organisations.[282] In particular, the Restatement refers to resolutions and other documents of the UN as reflective of State practice.[283]

It is worth emphasising that for a practice to be considered customary international law, it does not necessarily have to muster universal following. However, it must nevertheless command widespread acceptance. States must engage in the practice out of a sense of legal obligation. This requirement, referred to as *opinion juris*, is an important element in the formation of customary international law.[284] Although in certain circumstances it may be difficult to determine whether States act out of a sense of legal obligation or habit, such a sense of responsibility may therefore be implied from a State's conduct at the international and domestic spheres.

Malanczuk notes that a rule of customary international law is generally considered to be binding on all States in the international community.[285] The exception is where a State can show that it is a persistent objector to the emergence of the customary international law rule in question.[286] The International Court of Justice held in the *Asylum* and *Fisheries* cases that the doctrine of persistent objector is only applicable to a State that has persistently and openly objected to the emergence of an embryonic rule of customary international law.[287] The following section examines the conduct of States at both the municipal and the international levels with a view to determining whether there is sufficient and consistent practice supporting the emergence of a human right to water as a customary norm.

2 5 5 1 National constitutions

Many national constitutions in various regions of the world specifically impose obligations upon the States to ensure availability, quality, accessibility or affordability of water for the population at large. A number of such provisions include explicit references to the right to water. Similarly, the constitutions of over a hundred countries recognise the right to a healthy environment. The CESCR in its General

[282] See *Restatement of the Law, Third, the Foreign Relations Law of the United States* (1987) §102(2).
[283] §102(2).
[284] Malanczuk *International Law* 39-41.
[285] 48.
[286] Liebenberg *Socio-Economic Rights Adjudication* 103.
[287] *Anglo-Norwegian Fisheries Case (United Kingdom* v *Norway)* 1951 *ICJ Reports* 116-278. See also *Asylum Case (Colombia* v *Peru* 1950 ICJ Reports 266 – 331. It must however be noted that some aspects of customary international law have assumed the status of *jus cogens* from which no derogation is permitted. Such *jus cogens* norms include genocide, slavery and torture. See article 53 of the Vienna Convention on the Law of Treaties.

Comment 14 has interpreted the right to health in the ICESCR as incorporating a right of access to water.[288] This growing evidence of States enshrining the right to water in their national constitutions provides further evidence to support the emergence of a right to water under customary international law.

South Africa's 1996 Constitution for instance explicitly provides for a right to water. It provides in section 27(1)(b) the right of everyone to access sufficient water.[289] In one of its leading cases on socio-economic rights, the South African Constitutional Court in the case of *Mazibuko and Others* v *City of Johannesburg and Others*[290] was called upon to interpret the import of the above provision. The applicants had alleged violation of the right to have access to sufficient water under Section 27 of the South African Constitution. The case is fully discussed in chapter 4 below.[291] The *Mazibuko case* was very significant in that it was the first South African case in the Constitutional Court in which litigants explicitly sought enforcement of their constitutional right of access to sufficient water in terms of section 27(1)(b) of the South African Constitution. Legislation has further been enacted in South Africa to implement this right in the form of the Water Services Act[292] and the National Water Act.[293] Furthermore, Kenya's new constitution adopted in August 2010 guarantees every person a right to clean and safe water in adequate quantities.[294] Article 20(1) of Bolivia's 2009 constitution provides for everyone's right to universal and equitable access to basic water. The Bolivian constitution further provides for the criteria that must be met by service providers in the provision of basic services such as water. It provides that the provision of water services must meet the criteria of universality, accountability, accessibility, continuity, quality, efficiency, effectiveness, fair and necessary coverage rates, with participation and social control.[295] The

[288] See CESCR *General Comment No 14* (2000) paras 8, 11, 12 and 36.
[289] Constitution of South Africa (1996). The 1996 South African Constitution binds all three spheres of government to realise the right of access to water. The content of the right relates both to allowing for physical and for economic access to water. This obligation is qualified by the fact that the State has to take only "reasonable" legislative and other measures "within its available resources" to achieve the "progressive realisation" of the right of access to water. See Section 27(2) of the South African Constitution.
[290] *Mazibuko and Others v City of Johannesburg and Others* 2010 4 SA 1 (CC).
[291] See section 4 5 1 3, chapter 4.
[292] Water Services Act No 108 of 1997.
[293] National Water Act No 36 of 1998.
[294] See article 43(1)(d) of the Constitution of Kenya (2010).
[295] See article 20 of the Constitution of Bolivia (2009). It is also noteworthy that the Bolivian Constitution expressly forbids the privatisation of water services. It provides in article 20(111) that "[a]ccess to water and sanitation are human rights, and not subject to concession or privatisation and are subject to licensing and registrations, according to law."

Constitution of Uruguay recognises water as a natural resource essential for life hence "[a]ccess to drinking water and access to sanitation constitute fundamental human rights."[296] Different formulations of the right to water are recognised in a significant number of constitutions across the world.[297]

A significant number of national laws and policies contain specific entitlements in respect of the right to water for personal and domestic uses. A comprehensive study conducted by the Centre for Housing Rights and Evictions on water laws[298] reveal that a substantial number of laws and policies dealing with access to water were enacted after the adoption of General Comment 15 by the CESCR in 2002. A 2012 publication by three organisations, WASH United, Freshwater Action Network and WaterLex contains a comprehensive overview of laws, policies and regulations

[296] See article 47 of the Constitution of the Republic of Uruguay (1967).

[297] See also, Constitution of Ecuador (1998) which provides in article 23 for the State to recognise and guarantee [t]he right to a quality of life that ensures health, feeding and nutrition, potable water, a clean environment, social education, work, recreation, housing, clothing and other necessary services. Article 249 of the Ecuadorian constitution further provides that "[t]he State shall be responsible for the provision of public drinking water". Article 48 of the 2006 Constitution of the Democratic Republic of the Congo provides that "[t]he State guarantees the right to a decent dwelling, access to potable water and electricity". The 1987 Constitution of the Republic of Nicaragua imposes on the State the obligation to provide for basic services including water. It states in article 105 that:

> It is the obligation of the State to promote, facilitate and regulate the provision of the basic public services of energy, communication, water ... and the population has an inalienable right to have access to these services...It is the duty of the State to guarantee the control of the quality of goods and services.

The 1996 Ugandan constitution provides for a right to clean and safe water by stating under article XIV on General Social and Economic Objectives that "all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits." The right to water has also been recognised in the constitutions of a significant number of States, either as a directly enforceable right or in the form of directive principles of State policy. Although the latter are generally not legally binding, Indian courts, for instance have held them to be so fundamental in the governance of the country hence such principles impose a duty on the State to apply them in making laws. See Indian Supreme Court decision in the case of *Unni Krishnan v State of AP and Others* 1993 SCR (1) 594. Such constitutions in which the right to water has been recognised include the Constitution of Colombia (1991), Constitution of Eritrea (1997), Constitution of the Federal Republic of Ethiopia (1994), The Constitution of the Gambia (1996), Constitution of the Republic of Ecuador (1998), Constitution of the Republic of Nicaragua (1987), Constitution of the Argentine Nation (1994), Constitution of the Republic of Armenia (1995), Constitution of the People's Republic of Bangladesh (1994), Constitution of the Dominican Republic (2002), Constitution of Eritrea (1997), Constitution of the Federal Republic of Ethiopia (1994), The Constitution of the Gambia (1996), The Constitution of the Republic of Ghana (1992), Constitution of the Republic of Guatemala (1985), Constitution of the Co-operative Republic of Guyana (1980), Constitution of the Republic of Indonesia (1945), Constitution of the Islamic Republic of Iran (1979), Constitution of the Lao People's Democratic Republic (1991), Constitution of the Republic of Lithuania (1992), Constitution of the Republic of Malawi (1992), Constitution of The Republic of Mozambique (2005), Constitution of The Federal Republic of Nigeria (1999), Constitution of the Islamic Republic of Pakistan (1973) Constitution of the Republic of Panama (1972) Constitution of the Portuguese Republic (1997) Constitution of the Republic of Senegal (2001), Constitution of the Republic of Ukraine (1996), Constitution of the Bolivarian Republic of Venezuela (1999) and the Constitution of Zambia (1991).

[298] See Centre for Housing Rights & Evictions *Legal Resources for the Right to Water and Sanitation, International and National Standards* (2008) 74-222.

guaranteeing the human right to water at the international, regional and national levels.[299] What is noteworthy is that these laws and policies address access to water for personal and domestic use from a human rights perspective.[300] Such a trend is replicated in all geographical regions of the world and across all legal cultures.

Sanchez-Moreno & Higgins point that most States have engaged in a consistent practice of adopting measures to ensure water provision for their citizens.[301] This supports the requirement that an emerging norm of customary international law be evidenced by the general practice of States.[302] It could be argued that States are increasingly motivated by the belief that they have a legal obligation to ensure access to water for their inhabitants. This is evidenced by the binding treaties highlighted above in which the right to water has been inferred or expressly stated such as the ICESCR, CRC, CEDAW, ICCPR and regional instruments. There could be evidence suggesting that a universal rule of customary international law is in the process of emerging. The following section discusses the increasing recognition of the right of access to water under international soft law instruments.

2 5 5 2 Soft law instruments

Soft law has been defined differently by legal scholars. Guzman has defined soft law instruments as those non-binding rules or instruments that interpret or inform our understanding of binding legal rules.[303] To put it differently, they are non-binding interpretations and elaborations of binging legal instruments.[304] Liebenberg defined

---

[299] See WASH United *The Human Right to Safe Drinking Water and Sanitation in Law and Policy – A Sourcebook* (2012) 5.

[300] Many States have adopted laws and policies dealing with access to water. Some of the notable ones are: Algeria's Water Law No 05-12 of 4 August 2005; Angola's Water Act of 21 June 2002; Argentina's Law 17711 of 1968; Water Code of the Province of Cordoba, Law 5589/73, as amended by Law 8928/01 (Argentina); Water Code of the Province of Buenos Aires, Law 12.257 of 9 December 1998 (Argentina); Azerbaijan's 1997 Water Code of the Azerbaijan Republic; Bangladesh's National Water Policy of 1999; Belarus 's Law on Drinking Water Supply, Law No 271-Z of 24 June 1999; Burkina Faso's Framework Law on Water Management, Law No 002-2001; Cameroon's Water Code, Law No 98-005 of 14 April 1998; Quebec Water Policy, 2002 (Canada); Cape Verde's Water Code, Law No 41/II/84; Chile's Water Code, DFL No 1122 of 1981; Costa Rica's Water Law 276 of 27 August 1942. Other countries that have enacted water laws include Dominican Republic, El Salvador, France, Ghana, Guatemala, Guinea Bissau, Honduras, Indonesia, Ivory Coast, Israel, Kenya, Kyrgyzstan, Latvia, Madagascar, Malawi, Mauritania, Mexico, Moldova, Namibia, Nepal, Nicaragua, Pakistan, Palestine, Paraguay, Russian Federation, South Africa, Sri Lanka, Swaziland, Tajikistan, Tanzania, Uganda, Ukraine, United States, Venezuela, Zambia and Zimbabwe.

[301] McFarland Sanchez-Moreno and Higgins 2003-2004 *Fordham International Law Journal* 1728.

[302] 1728.

[303] AT Guzman *International Soft Law* (2009) UC Berkeley Public Law Research Paper No 1353444 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353444 (Accessed on 14.09.2010)> 6.

[304] 6.

soft law instruments as standards which have not yet crystallised into treaty provisions or norms of customary international law.[305] Such norms and standards include resolutions adopted at international conferences organised under the auspices of the UN or regional bodies such as the African Union. It also includes guidelines and reports adopted by international organisations, by special rapporteurs, working groups and other non-treaty based international mechanisms.[306] This dissertation adopts the latter definition.

Soft law instruments are thus statements of policy that do not possess formal legal enforceability. This follows from the doctrinal axiom of international law, endorsed by the International Court of Justice in the celebrated *Lotus* case,[307] that States cannot be bound without their consent. In this respect, they should be distinguished from treaties that are subject to signature and ratification, and that, once in force, are legally binding on the States that have ratified them. Soft law instruments such as resolutions and declarations are not subject to signing and ratification and as such, do not create binding effects. It is important though to note that soft law instruments may later create the impetus for latter binding instruments and further the definition of policy and principle in a given area.[308]

The importance of soft law instruments in the elaboration of States' obligations as provided by binding instruments has been endorsed by notable scholars. Rosalyn Higgins for instance, noted in 1995 that:

> "In international law, the passing of binding decisions [by an international body] is not the only way in which law development occurs. Legal consequences can also flow from acts which are not in the formal sense 'binding' [for example evidence of crystallising rule of customary international law."[309]

It is particularly noteworthy that soft law instruments like General Comments of UN treaty bodies are elaborations of States parties' obligations as provided for under binding treaties. The importance of further elaboration of binding instruments through the development of soft law standards is particularly significant. Most legal rules are

[305] See Liebenberg *Socio-Economic Rights* 102.
[306] 102-103.
[307] *SS Lotus (France v Turkey)* 1927 PCIJ (Series A) No 10, the court stated that "the rules of law binding upon States therefore emanate from their own free will."
[308] Salman & McInerney-Lankford *The Human Right to Water* 12.
[309] R Higgins *Problems and Process: International Law and How We Use It* (1995) 25.

phrased at some level of generality. It follows that whether any specific act or omission violates the rule will require detailing further what the rule requires.[310]

The section below discusses some of the major soft law instruments in which the right to access to water has been recognised. They range from declarations, action plans, resolutions and declarations of UN organs and declarations of intergovernmental organisations at both the international and regional levels. These instruments, although not in themselves legally binding, are a reflection of the currency that the human right to water has generated at the international level. They support the earlier assertion that there are clear signs of the emergence of the right to water as a rule of customary international law.

2 5 5 2 1 Stockholm Declaration

The 1972 UN Conference on Human Environment identified water as one of the natural resources that needed to be safeguarded.[311] Principle 2 of the Stockholm Declaration is of particular significance for the discussion of the right to water. This provision specifically provided that the earth's natural resources, including water, must be safeguarded for the benefit of present and future generations through careful planning and management.[312] Most scholars on the right to water are unanimous that the contemporary debate on the right to water is traceable to the Stockholm Declaration.[313]

2 5 5 2 2 Mar Del Plata Conference

The ground-breaking 1977 UN Water Conference held in Mar del Plata, Argentina, ("hereinafter referred to as the Mar del Plata Conference") expressly recognised that all peoples have the right to have access to drinking water to meet their basic needs. The Mar del Plata Conference was devoted to exclusively discussing the emerging global water resources problems.[314] The conference subsequently issued the Mar del Plata Action Plan, which sought to tackle these water resources challenges. A

[310] 35.
[311] UN *Conference on Human Environment Declaration* UN Doc A/Conf. 48/8 (1972).
[312] See UN *Conference on Human Environment: Stockholm Declaration* (1972) UN Doc. A/Conf. 48/8 (1972) principle 2.
[313] See Salman & McInerney-Lankford *The Human Right to Water* 7. See also McCaffrey 1992 *Georgetown International Environmental Law Review* 1-24; Gleick 1998 *Water Policy* 487-503 & Bluemel 2004 *Ecology Law Quarterly* 957-1006.
[314] See UN *Mar del Plata Water Conference Report* (1977) UN Doc No E/Conf.70.29.

significant outcome of the conference was to proclaim, through a UN General Assembly resolution adopted in 1980, the period 1981 to 1990 as the "International Drinking Water Supply and Sanitation Decade."[315] Salman and McInerney-Lankford emphasise that the action plan contributed immensely and gave the impetus towards the movement for the recognition of the right to water. The two authors particularly emphasise the importance of Resolution II on "Community Water Supply."[316] The resolution declared for the first time that:

> "All peoples, whatever their stage of development and their social and economic conditions have the right to have access to drinking water in quantities and of a quality equal to their basic needs."[317]

The resolution further emphasised that the universal recognition of a right to water is essential to both life and the full development of man as an individual and as an integral member of society.[318]

2 5 5 2 3 Agenda 21 of the 1992 UN Conference on Environment and Development

The 1992 UN Conference on Environment and Development's Agenda 21 on "Programme of Action for Sustainable Development" included a separate chapter on freshwater resources.[319] In its Chapter 18 on "Water Resources", Agenda 21 proclaimed that "the overall objective laid down for freshwater resources is to satisfy the freshwater needs of all countries for their sustainable development." On the issue of the need and right to water, Chapter 18 further stated that:

---

[315] The UN declared the period 1981–1990 as the International Drinking Water Supply and Sanitation Decade, during which Member States assumed a commitment to bring about a substantial improvement in the standards and levels of services in drinking water supply and sanitation by the year 1990. The UN General Assembly followed up on the matter and issued Resolution 40/171 on December 17, 1985 as a middle-of-the-decade reminder to the States in which it implored States to work extremely hard to meet the commitments made under the International Drinking and Water Supply Decade. See UN Doc A/RES/40/171 (1985).

[316] McInerney-Lankford *The Human Right to Water* (2004) 8.

[317] 8.

[318] 8.

[319] See UN Conference on Environment and Development: Agenda 21 of the Rio Summit on Programme on Action for Sustainable Development Rio Summit Report (1992) UN Doc A/CONF.151/26/Rev.1 (1992) para 3.8(p).

> "[W]ater resources have to be protected…in order to satisfy and reconcile [the] needs for water in human activities. In developing and using water resources, priority has to be given to the satisfaction of basic needs."[320]

The overall objective laid down for freshwater resources was to satisfy the fresh water needs of all countries for their sustainable development.[321]

2 5 5 2 4 UN Declaration on the Right to Development

The 1986 UN Declaration on the Right to Development (hereinafter referred to as the "Declaration"),[322] adopted by the UN General Assembly, includes a commitment by States to ensure equality of opportunity in accessing basic resources. In article 8 of the Declaration,[323] the UN General Assembly includes water as a basic resource necessary for the realisation of the right to development. The UN has elaborated on article 8 of the Declaration, noting that the persistent conditions of underdevelopment in which millions of people are "denied access to such essentials as food, water, clothing, housing and medicine in adequate measure" represent a violation of human rights.[324]

2 5 5 2 5 Cairo Declaration of the UN International Conference on Population and Development

The Programme of Action adopted by consensus of all 177 participating States at the 1994 UN International Conference on Population and Development, Cairo, also endorsed the right to water. It stated in Principle 2 that people within a State's jurisdiction have the right to an adequate standard of living for themselves and their

---

[320] McInerney-Lankford *The Human Right to Water* (2004) 8.
[321] 8.
[322] See UN *Declaration on the Right to Development* (1986) UN Doc A/41/53 (1986).
[323] Para 8 of the Declaration on the Right to Development provides that:
1. States should undertake, at the national level, all necessary measures for the realisation of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.
2. States should encourage popular participation in all spheres as an important factor in development and in the full realisation of all human rights. See UN *Declaration on the Right to Development* para 8.

[324] See P Gleick *The World's Water 2000-2001: The Biennial Report on Fresh Water Resources* (2000) 9.

families, including adequate food, clothing, housing, water and sanitation.[325] This constitutes the endorsement of water as a social value of fundamental importance and human right and a constituent element to an adequate standard of living discussed above.

2 5 5 2 6 UN bodies' resolutions on right to water

The 2010 UN General Assembly resolution[326] on the right to water and sanitation is by far the most recent endorsement of the right to water by the UN. This is evidenced by the overwhelming support accorded to the resolution by States.[327] This UN General Assembly resolution explicitly recognises the right to water, noting that the right to safe and clean drinking water is a human right essential for the full enjoyment of life and all human rights.[328] The resolution constitutes a global endorsement of the right to water given its overwhelming backing in the UN General Assembly. The

---

[325] UN *International Conference on Population and Development: Programme of Action* (1994) UN Doc A/CONF.171/13/Rev.1 principle 2 para 15.

[326] UN *The Human Right to Water and Sanitation* (2010) A/RES/64/292.

[327] Of the 192 member General Assembly, 122 States voted in favour and zero votes against the resolution, while 41 countries abstained from voting.

[328] See para 1 of the resolution. The operative part of GA resolution A/RES/64/292 provides:

> 1. *Recognises* the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights;
> 2. *Calls upon* States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all;
> 3. *Welcomes* the decision by the Human Rights Council to request that the independent expert on human rights obligations related to access to safe drinking water and sanitation submit an annual report to the General Assembly, and encourages her to continue working on all aspects of her mandate and, in consultation with all relevant United Nations agencies, funds and programmes, to include in her report to the Assembly...the principal challenges related to the realisation of the human right to safe and clean drinking water and sanitation and their impact on the achievement of the Millennium Development Goals.

The International Law Association (hereinafter referred to as "ILA") has also recognised a right to water under international law. The ILA is a membership organisation whose membership ranges from lawyers in private practice, academia, government and the judiciary, to non-lawyer experts from commercial, industrial and financial spheres, and representatives of bodies such as shipping and arbitration organisations and chambers of commerce. According to its constitution, the ILA is dedicated to the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law. Article 17 of the ILA's Berlin Rules on Water Resources (Berlin Rules) adopted at the ILA's Berlin conference in 2004 provide that "[e]very individual has a right of access to sufficient, safe, acceptable, physically accessible, and affordable water to meet that individual's vital human needs." See International Law Association, Berlin Conference, Water Resources Law: Berlin Rules on Water Resources (2004) article 17(1) (2004) <http://www.ila-hq.org/pdf/Water%20Resources/FinalReport%202004.pdf> (accessed on 06.10.2010). It is also noteworthy that the first UN Congress on the Prevention of Crime and the Treatment of Offenders, Minimum Rules for the Treatment of Prisoners approved by ECOSOC provides that "Prisoners shall be…provided with water…necessary for health and cleanliness." See UN *Congress on the Prevention of Crime and the Treatment Offenders, Minimum Rules for the Treatment of Prisoners* (1956) UN Doc A/Conf/6/1 para 15.

statements accompanying the votes are equally illuminating in their endorsement of the existence of the right to water under international law. Most of the statements pointed to the existence of the right to water either as a necessary component of other human rights recognised under international human rights law, or as an independent human right.[329]

The UN Human Rights Council (hereafter "Human Rights Council") has added further impetus in endorsing the existence of the right to water from the pre-existing international human rights instruments. In a recent watershed resolution, it explicitly stated that:

> "The human right to safe drinking water … is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity."[330]

---

[329] See UN *General Assembly Adopts Resolution Recognising Access To Clean Water and Sanitation* GA/10967 (2010) <http://www.un.org/News/Press/docs/2010/ga.doc.htm> (accessed 05.10.2010). The statements made by State representatives during the adoption of the resolution are quite illuminating in their endorsement of the right to water. Spain's representative argued that water was a component of the right to an adequate standard of living under the International Covenant on Economic, Social and Cultural Rights, a position also endorsed by the Hungarian representative. The representative of Brazil, for instance, asserted that the right to water and sanitation was intrinsically connected to the rights to life, health, food and adequate housing. This is also an endorsement of the interdependence and interrelatedness of all human rights discussed above. The representative of Argentina, speaking in explanation of his country's position after the vote, stated that the main human rights treaties were pillars of his country's legal order. He further stressed that the importance of drinking water had been recognised by many international instruments supported by Argentina, arguing that States had the main responsibility to ensure that people had access to safe drinking water. The representative of Australia also pointed out that access to water was linked to a range of civil rights. As argued above, the right to life - the pre-eminent civil right - is impossible of attainment without access to safe water. The representative of Costa Rica, in support of the resolution, argued that access to water was an inalienable right. She further pointed out that every State has the primary responsibility to provide its citizens with access to water. The representative of Mexico argued that the right of access to clean water is already extant in international instruments. The representative of Ethiopia pointed out that although his country had abstained from the voting process, access to clean water was a natural right. The representative of Liechtenstein argued that the explicit rights recognised in international human rights law implied many others, and that was true of water. This is an endorsement of the derivation of the right to water from related rights discussed above. The representative of Liechtenstein noted that his country understood that the resolution did not create a new right and that its aims fell under existing international human rights law. The representative of Yemen, as a co-sponsor of the resolution, stressed the importance of water for life, which led to its being a natural right. The representatives of Cuba and Nicaragua endorsed the resolution as a milestone after 25 years of discussion at the global level. The representative of Venezuela argued that water was a necessity for life and his country rejects its transformation as a commodity. The Observer for Palestine also argued that the right of access to clean water is a universal human right that should be enjoyed by all people, including those living under occupation. Germany, Togo, Norway, France, Egypt and Belgium expressly endorsed the resolution. The United States noted that safe water furthered the realisation of certain human rights but noted that adopting the resolution might undermine the work of the Human Rights Council's Special Rapporteur on human rights obligations relating to drinking water and sanitation.

[330] See para 3. The resolution further explicitly states in its preamble that:

Prior to adoption of the above resolution, the UN Human Rights Council appointed a Special Rapporteur (formerly Independent Expert) in 2008 on the issue of human rights obligations related to access to safe drinking water discussed above.[331] The Special Rapporteur's mandate also involves clarification of the content of human rights obligations, including non-discrimination obligations, in relation to access to water.[332] The UN High Commissioner for Human Rights adopted a report in 2007 elaborating on the scope and content of the relevant obligations related to equitable access to safe drinking water and sanitation under international human rights instruments. The Report of the High Commissioner explicitly pointed that "it is

---

> international human rights law instruments, including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities entail obligations for States parties in relation to access to safe drinking water.

See UN Human Rights Council *The Human Right to Safe Drinking Water and Sanitation* (2010) A/HRC/15/L.14. See also preamble to the UN Human Rights Council *Human Rights and Access to Safe Drinking Water and Sanitation Resolution* 7/22 (2008) on human rights and access to safe drinking water and sanitation which explicitly states that:

> [I]nternational human rights law instruments, including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities entail obligations for States parties in relation to access to safe drinking water.

Other international soft law instruments supportive of the emergence of a right to water under international law include the UN Principles for Older Persons (1991) UN Doc A/RES/46/91 (1991) which states that "older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help". The UN Rules for the Protection of Juveniles Deprived of their Liberty (1990) A/RES/45/113 provides under article 37 that:

> Every detention facility shall ensure that every juvenile receives food that is suitably prepared and presented at normal meal times and of a quality and quantity to satisfy the standards of dietetics, hygiene and health and, as far as possible, religious and cultural requirements. Clean drinking water should be available to every juvenile at any time.

The UN *Guiding Principles on Internal Displacement, Guiding Principles on Internal Displacement, Report of the Representative of the Secretary-General* (1998) 1997/39 UN Doc E/CN.4/1998/53/Add.2 provide in Principle 18(1)&(2)(a)that :

> All internally displaced persons have the right to an adequate standard of living...[a]t the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to...[e]ssential food and potable water.

Also note worthy is the Johannesburg Plan of Implementation of the World Summit on Sustainable Development (2002) UN Doc A/CONF.199/20 (2002). In article 25, the world leaders agreed to:

> Launch a programme of actions, with financial and technical assistance, to achieve the Millennium development goal on safe drinking water. In this respect, we agree to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water, as outlined in the Millennium Declaration.

[331] See section 2 2 above.

[332] See section 2 2 above on the mandate of the Special Rapporteur.

now time to consider access to safe drinking water and sanitation as a human right."[333]

The UN Guidelines for the realisation of the right to drinking water supply and sanitation prepared by the former Special Rapporteur on Water emphasised the right of everyone to sufficient quantity of clean water for personal and domestic uses.[334] The right to water has further been recognised in a significant number of declarations and final documents of UN and other intergovernmental conferences. This constitutes an endorsement of the emergence of the right to water as an independent right under international law.[335] The above clearly shows the recognition and

[333] See UN Human Rights Council *Report of the High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations related to Equitable Access to Drinking Water and Sanitation under International Human Rights Instruments* (2007) UN Doc A/HRC/6/3 para 66.

[334] See UN Sub-Commission on Human Rights *Realisation of the Right to Drinking Water and Sanitation* (2005) UN Doc E/CN.4/Sub.2/2005/25 para 6.

[335] The 1996 Habitat Agenda adopted by consensus of all 171 participating States at the Second UN Conference on Human Settlements (Habitat II), Istanbul, Turkey, recognised in paragraph 11 that:

> Everyone has the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation, and to the continuous improvement of living conditions.

See UN *Conference on Human Settlements* (1996) UN Doc A/CONF.165/14 para 11. In the Abuja Declaration adopted at the First Africa-South America Summit (ASA) in Abuja, Nigeria, on 30 November 2006, 53 African and 12 South American States committed to promoting the right of access to clean and safe water for their citizens. The Declaration provided under paragraph VI on Water Resources that:

> 18. We recognise the importance of water as a natural resource... [and an]essential element for life with socio-economic and environmental functions. We shall promote the right of our citizens to have access to clean and safe water and sanitation within our respective jurisdictions.

See *First Africa-South America Summit* (2006) ASA/Summit/doc.01(I). At the 1st *Asia-Pacific Water Summit*, held in Beppu, Japan, 3-4 December 2007, 49 countries in the Asia-Pacific region unanimously adopted the "Message from Beppu" Declaration which recognised the people's right to water as a basic human right and a fundamental aspect of human security. It stated that:

> We, the leaders of the Asia-Pacific, coming from all sectors of our societies and countries, meeting at the historic inaugural Asia-Pacific Water Summit, in the beautiful city of Beppu, in the hospitable Oita Prefecture of Japan, do hereby agree to...[r]ecognise the people's right to safe drinking water and basic sanitation as a basic human right and a fundamental aspect of human security.

See *Report of The Proceedings of the First Asia-Pacific Water Summit* (2007). <http://www.worldwatercouncil.org/fileadmin/wwc/Programs/Right_to_Water/Pdf_doct/Message_from_Beppu_071204.pdf> (accessed 06.10.2010). The Final Summit Document of the 14th Summit Conference of Heads of State and Government of the Non-Aligned Movement in Havana, Cuba (2006) emphasised the importance of access to water and implicitly endorsed General Comment No15 (2002) on the right to water. It stated in para 226 that :

> The Heads of State or Government recalled what was agreed by the UN Committee on Economic, Social and Cultural Rights in November 2002, recognise the importance of water as a vital and finite natural resource, which has an economic, social and environmental function, and acknowledged the right to water for all. See Non-Aligned Movement Declaration (2006) Doc1/Rev.3 < http://www.cohre.org/store/attachments_2006> (accessed 06.10.2010).

An identical provision was included in the Final Document of the 15th Ministerial Conference of the Non-Aligned Movement, Teheran (2008) and in the Final Document of the 14th Summit of Heads of States of the Non-Aligned Movement Egypt (2009) <http://unispal.un.org/UNISPAL.NSF/0/> (accessed 06.20.2010). Recommendation (2001) 14 of the Committee of Ministers to member States

importance of access to safe water hence its endorsement as a human right by UN bodies.

2 5 6 Conclusion

The above section demonstrated the increasing recognition of the right to water at the national level through national constitutions and domestic legislation, regulations and policies. A particularly significant and noteworthy development is also taking place at the international level. This is reflected by a considerable number of non-binding but persuasive soft law instruments, adopted both at the universal and regional levels, in which a right to water has been recognised and endorsed. What is particularly significant is the absence of serious objections, apart perhaps from some sporadic protests from countries like Canada and the United States.

It is however important to note that such protests are not premised on an outright rejection of the concept of the right to water under international law. They are predicated rather on the need for further elaboration on the scope and content of the right. As outlined above, a combination of both elements, State practice and *opinion iuris* have to be considered in the evolution of customary international law. It is still premature to speak of a general and consistent practice regarding the recognition of the right to water at the international level. Still, it must be observed that issues relating to access to water are increasingly being perceived from the human rights perspective as reflected in the above analysis of relevant instruments. This has implications for the evolution of the human rights to water as a norm of customary international law. Such a customary law norm would apply to all States regardless of

---

on the European Charter on Water Resources noted that international human rights instruments recognise the fundamental right of all human beings to be free from hunger and to an adequate standard of living and the right to water is included. It states in para 5 that:

> "Everyone has the right to a sufficient quantity of water for his or her basic needs...International human rights instruments recognise the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families. It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene. Social measures should be put in place to prevent the supply of water to destitute persons from being cut off." See Recommendation (2001) 14 of the Committee of Ministers to member States on the European Charter on Water Resources, representing each of the then 43 members of the Council of Europe at the time adopted by the Committee of Ministers on 17 October 2001 <https://wcd.coe.int/ViewDoc.jsp?id=231615&Site=COE> (accessed on 06.10.2010).

The 2008 Third South Asian Conference on Sanitation (SACOSAN III) held in India issued the Delhi Declaration. Paragraph 1 of the Delhi Declaration provides that "access to sanitation and safe drinking water is a basic right, and according national priority to sanitation is imperative." See The Third South Asian Conference on Sanitation (SACOSAN III) "Sanitation for Dignity and Health" (2008) <http://www.wsscc.org/fileadmin/files/p_Declaration_SACOSAN_III.pdf> (accessed on 06.10.2010).

whether or not they are parties to the treaties recognising the right to water unless they consistently object to the concretisation of access to water as a customary norm. The above section therefore demonstrated the emergence of the right to water as a norm of customary international law as reflected by State practice, both at the municipal and international level.

2 6 Normative content of the right to water

2 6 1 Introduction

The mere recognition of a human right to water in an instrument is not enough to ameliorate the plight of those without access to water. Writing within the South African context, Liebenberg argued that:

> "The Constitutional Court has a special responsibility to develop the meaning of all the rights in the Bill of Rights, no less so socio-economic rights such as the right of everyone to have access to sufficient water."[336]

Liebenberg's comment was a reaction to the *Mazibuko case* highlighted above. In that case, the South African Constitutional Court dismissed the arguments by residents of an informal settlement that their current free basic water supply of 25 litres per person per day was insufficient. This was despite the fact that section 27(1)(b) of the South African Constitution, as noted, explicitly provides for a justiciable and independent human right to water. That provision is operationalised by section 1 of the Water Services Act. The latter defines a basic water supply as:

> "The prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water of households, including informal households, to support life and personal hygiene."[337]

The *Mazibuko case* clearly illustrates the difficulty, and indeed the imperative necessity of defining the normative content of the right to water with certainty and clarity. Failure to do so with the necessary rigour will entail that such right will have no meaningful impact in the lives of ordinary people. The same can be said of the

[336] S Liebenberg "Water Rights reduced to a Trickle" *Mail and Guardian* (21 October 2010) <www.mg.co.za/articles/2009-10-21-water-rights-reduced-to-a-ticle> (accessed 22.03.2010).
[337] See Section 1 of the Water Services Act No 108 of 1997.

right to water under international human rights law. Elaborating the normative content of the right to water helps to ascertain the State's obligations with regard to that right. What follows is a discussion of the normative content of the right to water under international law as elaborated by General Comment 15. This section will however not deal with the detailed obligations imposed by the right to water as these are fully discussed in chapter 4.

The normative content of the right to water as set out in General Comment 15 encompasses both substantive and procedural components. The CESCR highlighted the fact that different conditions and circumstances may affect the contextual definition of the right to water. It is however pertinent to note that the substantive components of the right to water that apply in all circumstances comprise availability, accessibility and quality of water services.[338] The guiding principle is that the available water must be adequate for human dignity, life and health.[339] General Comment 15 explicitly states that the "right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."[340]

The CESCR further elucidated the procedural requirements of the right to water as entailing the right to information concerning water issues, the right to participation and the right to effective remedies.[341] General Comment 15 acknowledges the importance of water for a range of different purposes to realise many other rights. This includes the importance of ensuring sustainable access to water resources for agriculture to realise the right to adequate food. The above statement should however be subject to qualification. The CESCR unequivocally asserted that priority in the allocation of water must be given to the right to water for personal and domestic uses.[342]

[338] See CESCR *General Comment No 15* (2002) para 12.
[339] Para 11.
[340] See CESCR *General Comment No 15* (2002) para 2. Paragraph 2 proceeds to state the importance of adequate and safe water to prevent death from dehydration and disease, as well as for consumption, cooking, personal and domestic hygiene requirements.
[341] See CESCR *General Comment No 15* (2002) para 12.
[342] Para 6.

2 6 2 Adequacy

General Comment 15 provides that an adequate amount of safe water is necessary for human dignity, life and health.[343] This is to prevent death from dehydration, to reduce the risk of water-related diseases and to provide for consumption, cooking, personal and domestic hygienic requirements. Within the detailed provisions of paragraph 12 of General Comment 15, the three principles of availability, quality and accessibility contain the substantive standards regarding the content of the right to water. They set out the normative standards which must be satisfied by States in determining the quantum of water needed in various contexts to guarantee life, health, hygiene and dignity. They further set standards for safety and cleanliness of water and ensuring equal access, both physical and economic.[344]

The General Comment 15 thus provides that the quantity of water available for each person should correspond to the WHO guidelines.[345] The WHO Guidelines indicate that 50-100 litres of water per person per day are sufficient to cover all basic human needs. The WHO Guidelines consider 20 litres per person per day as the absolute minimum at which basic health can be maintained in most circumstances.[346] Gleick suggested that the international community adopt a figure of 50 litres per capita per day as a basic water requirement for domestic water supply.[347] The Sphere project[348] suggested 15 litres of water per capita per day as suitable for meeting minimum standards for disaster relief.[349] The UK's Department for International Development suggested that a minimum supply should be 20 litres per capita per day, whilst noting the importance of reducing distance and encouraging household connections.[350] Any rigid, context-blind reliance on the above standards

---

[343] Para 11.
[344] Para 12.
[345] General Comment No 15 states that the quantity of water available for each person should correspond to WHO Guidelines but further notes that some individuals and groups may also require additional water over and above that stipulated in the WHO Guidelines due to health, climate and work conditions, see para 12(a). Gleick has pointed out that the Basic Water Requirement for human needs is 50 litres per person per day, which he considers to be the internationally recognised minimum standard in a poor, urban context. See PH Gleick "Basic Water Requirements for Human Activities: Meeting Basic Needs" (1996) 21 *Water International* 83-92.
[346] G Howard & J Bartram *Domestic Water Quantity, Service Level and Health* (2003) 22.
[347] 87-88.
[348] The Sphere Project is a voluntary initiative that brings a wide range of humanitarian agencies together to improve the quality of humanitarian assistance and the accountability of humanitarian actors to their constituents, donors and affected populations. See The Sphere Project <http://www.sphereproject.org/about/> (accessed 23.09.2012).
[349] See WHO *Domestic Water Quantity* 1.
[350] 1.

should be avoided. The quantity required by each person varies to a certain extent based on circumstances such as sex, age, climate and temperature conditions.[351]

2 6 3 Quality

There is no doubt that sufficient water alone is not enough to ensure a human right to water. The safety component means that water for personal and domestic use must be safe and free from micro-organisms, chemical substances and radiological hazards.[352] This is in recognition of the fact that even though many people may receive this basic water requirement or more, in some cases the water delivered may not be of adequate quality. Additionally, General Comment 15 stipulates that water for personal and domestic use must be of an acceptable colour, odour and taste.[353]

2 6 4 Accessibility

The third principle that the CESCR articulated as a constituent element of the normative content of the right to water is accessibility. Water facilities and services must be accessible to everyone without discrimination.[354] General Comment 15 elaborates four dimensions to accessibility, namely physical accessibility, economic accessibility, non-discrimination and information accessibility.[355]

In terms of physical accessibility, water services should be within safe physical reach for all sections of the population.[356] Economic accessibility means that water must be affordable for all. Although water services can be provided at a price, it is important that direct and indirect costs associated with securing water must be affordable to all, particularly for vulnerable and marginalised sections of society.[357]

Information accessibility covers the right to receive and distribute information concerning water issues.[358] The right to information in relation to water issues, together with principle of non-discrimination in water provision are the most significant aspects of the right to water. This is because they entail the right of people to participate in decision-making processes on water policies, programmes and

[351] The quantity of water needed as a minimum varies in different circumstances. Sex, age, temperature and labour conditions play a role. See Bartram & Howard *Domestic Water Quantity* 22.
[352] CESCR *General Comment 15* (2002) para 12(b).
[353] Para 12(b).
[354] Para 12(c).
[355] Para 12(c).
[356] Para 12(c)(i).
[357] Para 12(c)(ii).
[358] Para 12(c)(iv).

actions. Non-discrimination means that water must be accessible to everyone, including the most vulnerable and marginalised communities.[359]

2 6 5 Critique of the normative content of the right to water

It must however be noted that some scholars have critiqued the normative content of the right to water as elaborated by General Comment 15. Cahill for instance argues that the General Comment 15 did not define the content of the right to water with much specificity. Cahill argues that it was crucial for the CESCR to define the content of the right to water with specificity so as to appropriately establish the normative content for the effective implementation of the right.[360] Cahill's concerns are that the scope and content of the right to water are ill-defined hence clarification is needed in order to strengthen the right through defining a clear scope and content of the right.

Cahill further argues that since there is a close relationship between the right to water and other related rights,[361] the relationship between that right and related rights is equivocal and needs to be investigated further. This is imperative so the contours of each right can be established in order to appropriately determine the right to water.[362] Cahill believes such clarity will enable effective implementation of the right. Cahill further asserts that:

> "In order to determine the scope and core of the right, it is imperative that these relationships between the right to water and related rights such as health, food, housing and the right to life are clarified. Until this is done, the right to water is always in danger of being deemed a derivative right and not a right of independent status."[363]

Others like Dinara Ziganshina also bemoan that General Comment 15 does not articulate the normative content of the right to water with much clarity and specificity. Dinara Zigashina criticises the omission by the CESCR of the water requirements for food production within the scope of the right to water.[364]

---

[359] Para 12(c)(iii).
[360] Cahill 2005 *The International Journal of Human Rights* 393.
[361] Cahill points out that the right to water is a derivative right and she defines a derivative right as a right deriving from other related or dependent rights. For the purposes of the right to water, these will include the rights to health, housing, food and life. See Cahill 2005 *The International Journal of Human Rights* 391.
[362] 394.
[363] 405.
[364] D Ziganshina "Rethinking the Right to Water" (2008) 1 *Santa Clara Journal of International Law* 113 118.

The General Comment 15 does in fact elaborate sufficiently on the normative content and scope of the right to water. Firstly, General Comment 15 makes it crystal clear in paragraph 2 that the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. Such access is "necessary to prevent death from dehydration, to reduce the risk of water related disease and to provide for consumption, cooking, personal and domestic hygiene requirements."[365] Furthermore, the CESCR emphasised that although water is necessary for food production, securing livelihoods and enjoying certain cultural practices, priority in the allocation of water must be given to the right to water for personal and domestic uses.[366] Water resources to prevent starvation and disease should also be given the necessary priority.[367]

In paragraph 37, General Comment 15 reiterates the above. At the very least, the right to water requires: firstly, access to the minimum essential amount of water that is sufficient and safe for domestic uses to prevent disease. Secondly, the normative content of the right to water enjoins non discrimination in access to water, especially for vulnerable or marginalised sections of society. Thirdly, General Comment 15 enjoins physical access to water facilities and services that provide sufficient and safe water with a sufficient number of water outlets to avoid prohibitive waiting times. Such water facilities must be at a reasonable distance from the household. Finally, personal security in accessing water is of cardinal importance.[368] It is also pertinent to note that the normative content of the right to water also encapsulates procedural rights of people to information concerning the State's activities regarding water, to participate in decision-making concerning water, and to an effective remedy in cases where the right is violated.[369]

In light of the observations above, it is clear that the CESCR appropriately defined the normative content of the right to water with sufficient specificity. It lays a sound legal basis for determining the obligations on State and non-State actors involved in the provision of water services, discussed in chapters 4, 5 and 6.

---

[365] CESCR *General Comment 15* (2002) para 2.
[366] Para 6.
[367] Para 6.
[368] Para 37.
[369] Paras 12-26. See section 6 2, chapter 6 for a discussion of the practices from various jurisdictions on procedural standards imposed by the right to water.

It must however be noted that the realities in the real world are that not all States are able to ensure the full realisation of the right to water in the short term. The State is however obliged to take steps "with a view to achieving progressively the full realisation of the rights recognised"[370] in the ICESCR, including the right to water. The concept of progressive realisation constitutes an acknowledgement that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.[371] A State's inability to ensure the full realisation of the right to access water in the short term does not absolve it from the obligation to take immediate steps to provide relief to those in urgent need to protect them from suffering irreparable harm.[372] The CESCR has elaborated in General Comment 3 that:

> "[T]he fact that realisation over time...is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'ˆtre, of the Covenant which is to establish clear obligations for States parties in respect of the full realisation of the rights in question."[373]

Some scholars have disputed the existence of a universal human right to water, though these are in a minority. The section below discusses and analyses some of the objections that have been raised by those opposed to the recognition of a universal human right to water. This will be followed by the conclusion to the chapter.

2 7 Objections to the existence of a right to water

The existence of a right to water under international law has been disputed by some scholars. The derivation of the right to water from the right to life enshrined in the ICCPR has been questioned. Dinstein for instance has argued that the human right

[370] See article 2 (1) of the ICESCR. See section 4 4 4, chapter 4 for further discussion on progressive realisation.
[371] See CESCR *General Comment No 3* (1990) para 9.
[372] See Liebenberg *Socio-Economic Rights* 187.
[373] CESCR *General Comment No 3* (1990) para 9.

to life is *per se* a civil right and does not guarantee any person against death from famine, cold or lack of medication.[374]

Two American lawyers, Dennis and Stewart, have also accused the CESCR of rewriting the provisions of the ICESCR as "the derivation of a separate right to water is without precedent."[375] They see the CESCR's inference of a right to water from the provisions of the ICESCR as part of a larger revisionist programme. Dennis and Stewart argue that the CESCR has unduly rewritten the provisions of the ICESCR and expanded the liability of State parties in a way neither borne out by the text of the covenant, nor by the history of its negotiations.[376] They further accused the CESCR of unilaterally altering the substantive content of the ICESCR as well as the States' obligations by deconstructing the right to an adequate standard of living in article 11 into at least four separate and distinct rights to adequate food, water, clothing and housing.[377] The two authors question the legal basis upon which the CESCR identified and elaborated a distinct right to water under article 11 of the ICESCR as there is no mention of water in the negotiating history of the ICESCR.[378]

In his critique of General Comment 15, Stephen Tully also advances some arguments in order to delegitimise the CESCR's derivation of a right to water from article 11 of the ICESCR.[379] Tully argues against the derivation of a right to water from article 11 of the ICESCR. In his view, that provision offers no interpretative space for new rights as doing so undermines the principle of legal security. According to Tully:

> "[The term] 'including' is a self-evidently imprecise term leading one to speculate on the number and nature of other characteristics essential to an adequate standard of living but not explicitly guaranteed by the Covenant. Does General Comment No. 15 herald rights to access electricity, the internet or other essential civic duties such as postal delivery?"[380]

[374] Y Dinstein "The Right to Life, Physical Integrity and Liberty" in L Henkin (ed) *The International Bill of Rights- The Covenant on Civil and Political Rights* (1981) 114 115.
[375] Dennis & Stewart 2004 *American Journal of International law* 493-494.
[376] 493-494.
[377] 493-494.
[378] 494.
[379] Tully 2008 (26) *Netherlands Quarterly of Human Rights* 35-63
[380] 37.

Tully thus advocates for a restrictive interpretation of the word, "including" and in order to avoid the possibility of a plethora of new rights. He further argues that an amendment to the ICESCR is legally required in order to incorporate the right to water in the treaty.[381] Additionally, Tully argues that deference must be given to the States' omission of water in the drafting of the ICESCR.

In response to the above critiques, Malcolm Langford notes that the interpretative methods of judicial or quasi-judicial bodies are the subject of long philosophical debates.[382] Langford argues that the method a judicial or quasi-judicial body chooses in interpreting legal instruments becomes particularly relevant "when the phraseology of legal instruments is ambiguous, or it has become so due to societal changes or the revelation of new or unforeseen facts."[383]

> "This debate is epistemological, ranging from literalist arguments, that the meaning of legal texts is self evident in the context of some jurisdictionally defined legal method, through to more relativist responses. It is also more normative, with some advocating more backward looking or historical approaches, (discerning the intentions of the drafters or relying on earlier precedents) while others call for purposive or teleological interpretations that may be more relevant to contemporary circumstances."[384]

Article 31 of the Vienna Convention on the Law of Treaties sets forth the general rules for interpretation of treaties. That provision states that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[385] The object of a treaty, purpose and context are teleological elements which militate against a narrow literal interpretation of treaty texts. In the context of international law, the interpretative criteria highlighted above lean in favour of a purposive approach that takes account of the evolution of international law.[386]

In adopting General Comments to the ICESCR, the CESCR was in effect tasked by States to interpret and elaborate the provisions of a treaty drafted more

---

[381] 38.
[382] Langford 2006 *Netherlands Quarterly of Human Rights* 435.
[383] 435.
[384] 435.
[385] Article 31. It is significant to note that the International Court of Justice ruled in the *Case Concerning the Arbitrary Award* that "[a]rticles 31 and 32 of the Vienna Convention on the Law of Treaties...may in many respects be considered as codification of existing customary international law." See *Case Concerning the Arbitral Award of 31 July 1989 (Guinea Bissau v Senegal)* ICJ Reports 69-70 para 48.
[386] Langford 2006 *Netherlands Quarterly of Human Rights* 435.

than 50 years ago in the context of today's circumstances.[387] It must be further noted that the UN's Economic and Social Council (hereinafter referred to as "ECOSOC") encouraged the CESCR to use the mechanism of adopting General Comments to develop a fuller appreciation of the obligations of States parties under the ICESCR. As indicated above, the primary function of General Comments, as the above ECOSOC resolution makes clear, is to guide States on the implementation of the provisions of the ICESCR.[388] In any case, there is no doubt that a right to water is so fundamental as to require immediate minimum essential levels of water for personal and domestic uses. Such an approach is consistent with the obligation of good faith compliance with treaties. Tully's contention for a restrictive interpretation of the word "including" in article 11 of ICESCR to curtail a flood of new rights avoids mention of the CESCR's key reasoning in the adoption of a general comment on the right to water.[389] The CESCR explicitly emphasised that the fundamental human need for water unquestionably furnishes it with a special status:

> "The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival."[390]

The discussion above clearly illustrated various provisions at the international, regional and domestic level in which the right to water has either been explicitly or implicitly recognised as an independent right. The CESCR was therefore able to conclude that water is clearly in the class of food, housing and access to health services.[391]

Tully, Dennis and Stewart's argument that the CESCR was engaged in revisionism by inferring a right to water from the ICESCR has also been countered by scholars. Langford for instance asserts that the right to water was never rejected by the drafters as the records indicate that the issue was never discussed by the UN Commission on Human Rights or the Third Committee.[392] Langford provides a comprehensive analysis of the various debates surrounding the adoption of article 11 of the ICESCR. He concludes that the *travaux preparatoures* provides little guidance

[387] 435.
[388] 436.
[389] 436.
[390] See CESCR *General Comment No 15* (2002) para 2.
[391] Langford 2006 *Netherlands Quarterly of Human Rights* 438.
[392] 441.

as to the interpretation of the currently worded article 11 of ICESCR, and only indicates the difficulties some delegates experienced with trying to delimit the broad wording of the right to an adequate standard of living.[393]

The scepticism by some scholars and States regarding the right to water stems from the larger jurisprudential and political debates regarding the alleged differences between civil and political rights on the one hand, and economic and social rights on the other.[394] The traditional understanding of civil and political rights is to conceive them as negative rights, requiring the State merely to refrain from interfering with the enjoyment of such rights. The classical understanding of economic and social rights is to conceive of them as requiring positive State action and significant budgetary demands on State resources.

The above dichotomy has been challenged as being out of date reflective of the Cold War era ideology.[395] In any case, a closer examination reveals that civil and political rights are not absolutely dissimilar from social and economic rights in many respects. Civil and political rights also impose affirmative duties in the same way as socio-economic rights. For instance States are enjoined by some human rights instruments to organise governmental institutions that would ensure the realisation of civil and political rights, something which requires spending resources.[396] Amartya Sen has also forcefully critiqued the privileging of "negative liberties" over economic needs as being rooted in an unduly narrow conception of freedom and justice.[397]

Writing in 1984, Phillip Alston argued that "recognition of the essential dynamism of the notion of human rights inevitably requires a willingness to consider the need to proclaim additional rights."[398] Alston's view is that it is important to adopt such a dynamic approach that fully reflects changing needs and responds to the emergence of new threats to human dignity and well-being.[399] Alston proceeds to suggest criteria for the recognition of new human rights, chief among them being that any right should reflect a social value of fundamental importance.[400] According to Alston's criteria, any proposed new human right should reflect a fundamentally

[393] 441-442.
[394] Petrova 2006 *Brooklyn International Law Journal* 499.
[395] 499.
[396] 499.
[397] See generally A Sen *Development as Freedom* (1999).
[398] P Alston "Conjuring up New Rights: a Proposal for Quality Control" (1984) 78 *American Journal of International Law* 607- 609.
[399] 607-609.
[400] 614-615.

important social value and be relevant throughout a world of divergent value systems.[401] Additionally, any proposed human right must be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law.[402] Alston further proposed that any new right must be consistent with the existing body of international human rights law and be capable of achieving a very high degree of international consensus.[403] Lastly, any proposed right must be compatible with the general practice of States and be sufficiently precise as to give rise to identifiable entitlements and obligations.[404]

The human rights status of water cannot be questioned. Access to water for domestic and personal uses is "something which all men everywhere, at all times ought to have, something of which no one may be deprived."[405] The need for water is a:

> "[C]ondition of living, without which, in any given historical stage of society, men cannot give the best of themselves as active members of the community because they are deprived of the means to fulfill themselves as human beings."[406]

This chapter drew from Craig Scott's interdependence of human rights framework to argue for the existence of the human right to water under international human rights law, and to elaborate on its substantive content. This is because there is organic interdependence between human rights as the right to water forms part and is incorporated into other rights such as the right to health, life and food.[407] The significance of such a framework lies in its bid to define a coherent scope of a right to water that takes account of its relationship to directly protected rights. Such an exercise is important for clarifying its status as a fully autonomous right.

---

[401] 614.
[402] 614.
[403] 615.
[404] 615.
[405] See M Cranston *What are Human Rights*? (1973) 36.
[406] This was the definition of a right by the UNESCO Committee on the Theoretical Bases of Human Rights, established in 1947 with a view to contributing to the proposed UDHR. See Alston 1984 *American Journal of International Law* 615.
[407] See Scott 1989 *Osgoode Hall Law Journal* 779-784.

2 8 Conclusion

Water is of fundamental importance for a life in dignity as a basic need and a human right. Yet the current statistics are sobering. This has catastrophic implications for health, education, personal security as well as the realisation of other human rights.

This chapter demonstrated that the most significant development has been the rise of a human rights oriented approach to ameliorating the global water crisis. The rise of a human rights based approach to addressing the global water crisis has been substantially aided by watershed normative developments in international human rights law. The consequent inclusion of water in the development agenda has precipitated the call for a right to water.

Another noticeable development, promoted by multilateral lending and donor institutions, was the conception of water as an economic good susceptible to commodification and marketisation. It has been shown that the ideological, political and philosophical debates surrounding this conception of water as an economic good emboldened the lobby for the explicit recognition of water as a human right. The latter argument was predicated on the ground that water is a basic need, a human right and a public good. Its commodification, it was argued, will lead to lack of access, especially by the poor and vulnerable members of society.

The right to water is also explicitly provided in some international human rights instruments as the CEDAW, CRC and the Disability Convention. It is also implicitly provided in the provisions of the UDHR, ICESCR and the ICCPR. It was also shown that the right of access to water for personal and domestic uses is an indispensable component to an adequate standard of living. There is no doubt that access to basic supplies of safe and adequate water is a *conditio sine qua non* for the sustenance of human life itself. The realisation of the right to health and a healthy environment require access to an adequate supply of safe and potable water, rendering water as a core component of the right to health. Similarly, safe and clean water is a fundamental component of the right to adequate housing. Denial of a safe and clean water supply would render a dwelling inhabitable. Water is indispensable for the preparation of food, and in any case, drinking water, as shown above, is regarded as liquid food.

This chapter also demonstrated how the UN CESCR took the initiative by construing a human right to water from the existing international human rights

instruments through the ground-breaking General Comment 15. This standard-setting instrument marked the shift toward elaborating the legal basis and normative content and obligations engendered by a human right to water. General Comment 15 marked the UN's explicit affirmation of the existence of an independent human right to water. It also provided the impetus for the explicit and implicit recognition of the right to water in a substantial number of national constitutions from all over the world and across legal cultures.

It is also important to understand the right to water within the realm of the interrelatedness and interdependent nature of all human rights. There is organic and related interdependence of all human rights. This is because there is a profound and multilayered connection between all human rights. This chapter demonstrated that the right of access to water is intrinsically connected and is a part of other human rights. It is indispensable to the realisation of other human rights. The above is aptly illustrated in General Comment 15. It was shown that the General Comment 15 recognised the right to water through derivation and inference from articles 11 and 12 in the ICESCR. The CESCR further derived the right to water through an analysis of the centrality and necessity of water to other rights under the ICESCR and the other instruments under the International Bill of Rights. It emphasised the interrelated and integrated nature of the right to water to other human rights.

This chapter further demonstrated the emergence of the right of access to water as a norm of customary international law. There is widespread recognition of the right to water at the national level through national constitutions and domestic legislation, regulations and policies. A particularly significant and noteworthy development is also taking place at the international level. It is however too early to positively assert that a human right to water is now extant under customary international law.

As indicated, some scholars have disputed the existence of a right to water under international law. The main thrust of their objection is the derivation of the right to water from related rights. To such scholars, this amount to rewriting the provisions of the treaties, and part of a larger revisionist program. It was shown that such arguments cannot be sustained. A proper interpretation of the International Bill of Human Rights means that it is perfectly legitimate and permissible to derive a human right to water from related rights. Any legal instrument must be interpreted in accordance with its object, purpose and context. The object of a treaty, purpose and

context are teleological elements which militate against a narrow literal interpretation of treaty texts. In the context of international law the interpretative criteria highlighted enjoin a purposive approach that takes account of the evolution of international law. The human rights status of water cannot be questioned. Access to water is intrinsically related to all human rights.

The following chapter will discuss privatisation and the divergent meanings of the concept. Particular focus will be given of increased participation by non-State actors in the water services sector and an analysis of the impact of privatisation on the human right to water.

Chapter 3

Privatisation and the right to water

3 1 Introduction

The last thirty years has witnessed a dramatic decrease in the role of the State in economic activities.[1] The monolithic State generated by the twentieth century concern for welfare has come to be regarded as wasteful and inefficient at delivering resources.[2] The result has been the promotion of privatisation,[3] particularly by international financial institutions and donor agencies, as the panacea to rolling back the frontiers of a bulky and parasitic State.[4]

Privatisation has seen a shift from service provision by the State in some key sectors such as health, education, water provision to increased reliance on private actors and the deployment of market mechanisms to pursue social goals.[5] Consequently, across a whole range of different sectors, there has been a transfer of responsibility from the public sector to the private sector.[6] This has resulted in services hitherto provided by the public sector such as water provision in the hands of private corporations. The State is increasingly arrogated only the responsibility for setting down the framework within which non-State actors operate.[7] Such a framework departs radically from what before was a focus on and significant State control in the production, management and supply of water services.[8]

Privatisation processes covering human rights sensitive areas such as water inevitably involve a private operator in actions that impact on human rights. Weaker accountability mechanisms for human rights protection particularly where non-State

---

[1] DM Newbery "Privatisation and Liberalisation of Network Utilities" (1997) 41 *European Economic Review* 357 357.
[2] See C Hoexter *Administrative Law in South Africa* (2007) 147.
[3] Privatisation is understood here in a broad sense, including the change from public to private ownership and introduction of market principles in governance structures. The privatisation concept is fully explained in the following section.
[4] HB Feigenbaum & JR Henig "The Political Underpinnings of Privatisation: A Typology" (1994) 46 *World Politics* 185.
[5] 188.
[6] G Teubner "After Privatisation? The Many Autonomies of Private Law" (1998) 51 *Current Legal Problems* 393 393.
[7] K De Feyter & FG Isa "Privatisation and Human Rights: An Overview" in F De Feyter & FG Isa (eds) *Privatisation and Human Rights in the Age of Globalisation* (2005) 1.
[8] Bakker for instance points out that governments owned and operated most water supply systems in industrialised countries, with water supplied often at a subsidised rate ostensibly to ensure universal access and to safeguard public health. See K Bakker *Privatising Water: Government Failure and the World's Urban Water Crisis* (2010) 33. See also part 3 2 5 below on the rise of privatisation, particularly from the 1980s to the 1990s.

actors are involved in the provision of water services is a cause of concern.[9] In addition, accountability is further eroded by the paucity of direct international human rights obligations on non-State actors.

In this chapter, I analyse water privatisation from a human rights perspective, in particular the right to water as provided for under international human rights instruments and elaborated by treaty bodies and domestic legal systems. The principal question that arises is how a State can ensure compliance with its human rights obligations in the event of involvement of non-State actors in the management and distribution of water services. Rights of participation, access to information and access to remedies are some of the issues to be confronted whenever a private entity takes over responsibility for service delivery, particularly water provision.

This chapter is divided into four parts. In the first part, I start by defining privatisation and the divergent meanings of the concept. The rise of privatisation as a political-economic concept and increased private sector participation in sectors hitherto dominated by the State and its agencies will be described. This section will focus on global trends towards the privatisation of water services. The second part of the chapter will discuss the various manifestations of water privatisation across the world. This will be followed by a discussion of the arguments that have been deployed to support or oppose water services privatisation. This section will also discuss another alternative approach to the contestation which argues for the recognition of water as both an economic good and a basic human right. The third part of the chapter will discuss four select examples of water privatisation from Tanzania, Bolivia, The Philippines and South Africa. This discussion does not purport to constitute comprehensive case studies given the limited scope of this dissertation. Rather, this part aims to illustrate the potential impact of privatisation on the human right to water through examining concrete issues which arise in the context of water privatisation in different jurisdictions. The final part of the chapter will focus on a human rights analysis of water privatisation and its potential consequences identified from the aforementioned case studies, followed by the conclusion.

[9] This is fully discussed in section 3 5 below where I discuss four select examples of water privatisation from Tanzania, Bolivia, The Philippines and South Africa.

3 2 The concept of privatisation

3 2 1 Introduction

Privatisation as a term is mired in definitional uncertainty.[10] Bakker, writing within the context of water privatisation noted the difficulties attendant on defining the term.[11] To Bakker, terminology is rarely neutral as it signals allegiances.[12] The definitional conundrum thus "reflects the slippery analytical terrain of …privatisation debates and the inadequacy of conventional terminology to convey [its] complexities."[13] Donnison argues that the meaning of privatisation is uncertain and often tendentious since it is "a word invented by politicians and disseminated by political journalists."[14] Narsiah echoes the above sentiments, noting that privatisation is a nebulous term.[15]

Privatisation is not a neutral phenomenon as it carries inherent political and ideological implications.[16] Much of the privatisation trends often reflect a desire to limit the State's role in the provision of public goods. Such trends are often tied to particular ideological proclivities regarding substantive visions of State policies.[17] Khan, in particular, asserts that privatisation's roots are deeply entrenched in the ideological foundations of the neo-liberal right.[18] This group regards the market as wholly benign and finds the private sector inherently superior to the public sector in the production and provision of goods and services. This approach is convinced of the superiority of the "free market form of social organisation over the forms of social organisations of the Keynesian welfare [S]tate."[19] The free market is perceived as an advance on welfare State social democracy and a provider of economic efficiency.[20] The last two decades have thus seen concerted reform efforts principally designed to

[10] See L Lundqvist "Privatisation: Towards a Concept for Comparative Policy Analysis" 1988 (8) *Journal of Public Policy* 1.
[11] K Bakker *Privatising Water: Governance Failure and the World's Urban Water Crisis* (2010) xv.
[12] xv.
[13] xv.
[14] D Donnison "The Progressive Potential of Privatisation" in J Le Grand & R Robinson (eds) *Privatisation and the Welfare State* (1984) 41 45.
[15] Privatisation is thus, according to Narsiah, "the very incarnation of the liberal project." See S Narsiah "Discourses of Privatisation: The Case of South Africa's Water Sector" (2008) 25 *Development Southern Africa* 21 22.
[16] E Metzger "Privatisation as Delegation" (2003) 103 *Columbia Law Review* 1367 1378.
[17] Metzger 2003 *Columbia Law Review* 1377-1378.
[18] I Khan *Public vs. Private Sector: An Examination of Neo-Liberal Ideology* (2006). Unpublished paper <http://mpra.ub.uni-muenchen.de/13443/1> (accessed 26.08.2010).
[19] Khan *Public vs. Private Sector* 1-2.
[20] T Taylor *Structural Macroeconomics, Applicable Models for the Third World* (1983) 6.

reduce the role of the State and expand the role of the market in the production and provision of goods and services.[21]

Privatisation, as will be shown below, can take a variety of forms. In some instances, privatisation represents State withdrawal from a field of activity or from responsibility for providing services, as for example when a public entity sells off a State-owned entity to a private entity.[22] The other, more common model of privatisation is when the State engages private entities to provide services to the public on the State's behalf. This form of privatisation is normally characterised by government agencies giving private entities significant control over, and responsibility for, the provision of basic services ordinarily provided by the State. The result is that private entities end up having significant control over the public's access to basic goods and services ordinarily provided by the State.[23] In this context, privatisation often effectively serves to delegate government power to private entities.[24]

Metzger further notes the definitional difficulties posed by the broad array of public-private relationships encompassed under privatisation arrangements.[25] John Donahue alludes to the same difficulty in defining the concept of privatisation.[26] He notes that the word privatisation encompasses two concepts. The first concept involves removing certain responsibilities, activities, or assets from the public realm. The second conception of privatisation involves the State retaining collective financing but delegating delivery of public goods to the private sector.[27]

3 2 2 Narrow definition of privatisation

Various definitions of the term privatisation have been proposed. Proponents of privatisation often use a relatively constrained definition, reserving the term privatisation for the outright sale of State assets to the private sector. A number of scholars have advocated for a constrained understanding of privatisation. Hanke conceptualises privatisation as the transfer of public assets, infrastructure, and

[21] Khan *Public vs. Private Sector* 1.
[22] In this form of privatisation, encountered in England and Wales, publicly operated monopolies are transferred as a whole to a private enterprise-oriented provider. In England and Wales ten water service companies were created in this manner and their shares were sold on the stock exchange.
[23] Metzger 2003 *Columbia Law Review* 1367 1370-1371.
[24] 1376-1377.
[25] 1378.
[26] 1378.
[27] 1378.

service functions to the private sector.[28] Abramowitz takes a similar view and defines privatisation as the placing of public assets into private hands.[29] Savas defines privatisation as the increasing the role of the private sector in the ownership of assets and concomitantly reducing the role of the State.[30] The above definitions of privatisation constitute a narrow sense of the understanding of privatisation.

According to the understanding of privatisation delineated above, the concept is delimited to a complete change or a transfer from the public to the private sector. It follows that any changes or transfers that do not follow this direction would thus have to be excised from the rubric of privatisation.[31] In this traditional sense, privatisation refers to decreased State involvement in collective consumption and the transfer of ownership of State assets to the private sector.[32] This form of privatisation is rare in the water sector. The privatisation of England and Wales' water utilities in 1989 is the most prominent case of full privatisation.

3 2 2 Expanded definition of privatisation

Opponents of the participation of private entities in the provision of public goods often use the word privatisation as an umbrella term. It is thus used to denote the entire gamut of activities involving the participation of private entities in the provision of public goods, either on behalf of, or in cooperation with the State or its agencies. This may take the form of concessions, management and service contracts, consulting services, and public-private partnerships with State agencies.[33] These are discussed in section 3 3 below.

A number of authors have adopted a broad definition of privatisation. Heald conceives of privatisation as equal to the introduction of market principles in the

---

[28] SA Hanke "Privatisation: Theory, Evidence and Implementation" (1985) 35 *Proceedings of the Academy of Political Science* 101 101.

[29] See M Abramowitz "The Privatisation of the Welfare State: A Review" (1986) 4 *Social Work* 257 257.

[30] ES Savas *Privatisation: The Key to Better Government* (1987) 3.

[31] 4.

[32] S Narsiah "The Neoliberalisation of the Local State in Durban, South Africa" (2010) 42 *Antipode* 374 381. Some commentators such as Narsiah however reject this traditional understanding of privatisation as being under-inclusive. Nasiah notes that in the modern sense, privatisation is also used to encompass a shift in the production of goods and services from the public sphere to the private sphere. This can manifest itself through adoption of commercial principles; the substitution of private goods for public goods; sub-contracting; and corporatisation. See Narsiah 2010 *Antipode* 374 381. See also Narsiah in another publication where he notes the conventional view in which privatisation is restricted to entail a change in ownership from the public sector to the private sector. See Narsiah 2008 *Development Southern Africa* 22-23.

[33] Bakker *Privatisation* xv.

provision of welfare. In that sense, privatisation is seen as a diverse set of policies geared towards strengthening the market at the expense of the State.[34] Shackelton views privatisation as not limited to the transfer of public functions, duties and assets from the public sphere to the private sphere. It also involves a range of other means by which the public sector is exposed to market principles.[35] Eisinger equates privatisation as a conscious government policy of enlisting private capital, managerial techniques and personnel to perform functions that are deemed to fall within the domain of the public sector responsibility.[36]

Martin, for instance, suggests that privatisation entailed a change in the role and responsibilities of the State rather than simply a change of ownership.[37] Such a definition will not just encompass a transfer of hitherto publicly-owned assets from State ownership to private ownership. It encompasses an understanding of privatisation in which the State remains the primary service provider and producer. Furthermore, it incorporates a more entrepreneurial approach, including market-stimulating decision-making techniques.[38] This may be through the adoption of market principles such as full-cost recovery.[39] This broad understanding is consistent with viewing such concepts as "corporatisation" of public enterprises and the so-called Public-Private Partnerships (hereinafter referred to as "PPPs") as forms of privatisation. This study will adopt this expansive understanding of privatisation. As noted by Chirwa, corporatised entities often engage in outsourcing of some of their services to private actors.[40] In some cases, corporatisation can be a stepping-stone towards full privatisation of the service in question.[41] Significantly, most of the human rights concerns raised by other forms of privatisation are similar to those that arise in the context of corporatisation of a service.[42]

---

[34] D Heald "Privatisation and Public Money" in D Steel & D Heald (eds) *Privatising Public Enterprises: Options and Dilemmas* (1984) 21 21.
[35] JR Shackleton "Privatisation: The Case Examined" (1984) *National Westminister Bank Quarterly Review* 59.
[36] PK Eisinger "French Urban Housing and the Mixed Economy: The Privatisation of the Public Sector" (1982) 459 *Annals of the American Academy of Political and Social Sciences* 134 135.
[37] 135.
[38] K Bakker "From State to Market?: Water Mercantilism in Spain" 2002 (34) *Environmental and Planning* 767 770.
[39] 770.
[40] See DM Chirwa "Water Privatisation and Socio-Economic Rights in South Africa" (2004) 8 *Law, Democracy and Development* 181 184.
[41] 184.
[42] 185.

3 2 3 Privatisation, liberalisation and corporatisation

The relationship between privatisation and the concept of corporatisation also warrants discussion. Chirwa defines corporatisation as the integration of corporate principles in operation and management of public entities involved in service provision.[43] This relationship is highly relevant as will be shown by the discussion of privatisation in South Africa below. Corporatisation, together with privatisation, is increasingly being employed in the delivery of basic services.[44] The main reason for corporatising a public service is to infuse market principles in its operations. It must be noted that a corporatised entity is also bound by similar market principles applicable to privatised entities.[45] The analysis of privatisation and its impacts in this chapter are relevant, and have implications for corporatised entities.[46]

It is important to differentiate between privatisation and liberalisation although the principle of liberalisation is also closely linked to privatisation. The former entails measures aimed at opening up the market to ensure entry of other actors in an industry to ensure competition.[47] Privatisation and liberalisation are closely linked, but not always in the same way. Liberalisation is a broader concept than privatisation. Liberalisation thus may entail trade liberalisation in the form of lifting of tariff and non-tariff barriers against foreign trade. Liberalisation may also entail the removal of regulations on prices and removal of subsidies and lifting of monopolies in the process opening the market for private sector participation in the production of goods and services.[48] In this chapter, focus is on privatisation though reference will be made to liberalisation as it affects privatisation. The following section will discuss the extent of privatisation of public enterprises in general, particularly in the late 1970s and the early 1980s, as well as a discussion of the underlying reasons for such a privatisation spur.

---

[43] DM Chirwa "Privatisation of Water in Southern Africa: A Human Rights Perspective" (2004) 4 *African Human Rights Law Journal* 218 221.
[44] 221-222.
[45] 222.
[46] 222.
[47] Chirwa 2004 *African Human Rights Law Journal* 221. Chirwa further notes that such measures include tariff removals or reduction, removal of subsidies, and introduction of cost-recovery measures. The implications for human rights of the privatisation of basic services cannot be discussed in isolation from these principles.
[48] See B Bull *The World Bank's and the IMF's use of Conditionality to Encourage Privatisation and Liberalisation* (2006) 2 <http://www.regjeringen.no/uploadfi> (accessed 05.05.2011).

3 2 4 The magnitude of privatisation

Bortolotti, Fantini & Siniscalco point out that between the period 1977-1997, more than 1850 large-scale privatisations were carried out across the world. These involved more than 100 countries, and all the sectors in which State-owned enterprises traditionally operate such as power, electricity, railways and water provision.[49] Covadonga Meseguer likened privatisation to a "wave" and "major phenomenon" as it became established policy in both developed and developing counties with different political systems.[50] Another World Bank publication remarked in 1999 that privatisation moved from novelty to global orthodoxy in the space of two decades,[51] noting that:

> "Privatisation appears to have swept the field and won the day. More than 100 countries, on every continent, have privatised some or most of their SOEs in every conceivable sector of infrastructure, manufacturing and services."[52]

Privatisation of public enterprises from the mid-1980s to the mid-1990s was, to Boycko, Shleifer & Vishny like a "tsunami wave" with thousands of State-owned firms from across the world being privatised.[53] Brune *et al* give an even higher figure, noting that the privatisation of public enterprises has been a defining characteristic of the global economy in the last two decades of the twentieth century. They point out that more than 8000 acts of privatisation were completed between 1985 and 1999.[54] An authoritative 1996 World Bank publication, studying the privatisation statistics in the developing world from 1970 to 1995 alluded to the privatisation trend as a "revolution."[55] It is pointed out that between 1988 and 1994, developing States privatised over 3000 entities, noting that between 1988 and 1994, the number of

[49] B Bortolotti, M Fantini & D Siniscalco "Privatisation: Politics, Institutions, and Financial Markets" (2001) 2 *Emerging Markets Review* 109 136.
[50] C Meseguer "What Role for Learning: The Diffusion of Privatisation in OECD and Latin American Countries" (2004) 24 *Journal of Public Policy* 229 300.
[51] JR Nellis "Time to Rethink Privatisation in the Transition Economies?" (1999) *The World Bank and IFC* 3.
[52] 1.
[53] M Boycko, A Shleifer & RW Vishny "A Theory of Privatisation" (1996) 106 *The Economic Journal* 309.
[54] N Brune, B Garret & B Kogut "The IMF and the Global Spread of Privatisation" 2004 (31) *IMF Staff Papers* 195.
[55] L Bouton & MA Sumlinski "Trends in Private Investment in Developing Countries: Statistics for 1970 to 1995" 1996 (63) *World Bank Publications* 5.

developing countries privatising public enterprises dramatically rose from a paltry fourteen to a staggering sixty.[56]

3 2 4 1 Reasons for the privatisation spur

During the past two decades, privatisation has been deemed as the solution to State failure to provide basic services as the private sector was deemed more efficient and cost effective.[57] Peter Drucker famously argued nearly half a century ago that government should spend more time governing and less time providing. Instead, the State should simply stop producing and purchase services from the private sector.[58]

Khan explains that two major philosophical underpinnings inform the debate on private provision versus public sector provision debate. He points to the public interest school that perceives society as having common interests whom the State is competent to identify and serve.[59] On the other hand, the private interest school regards a person "as a rational economic actor who will instinctively maximise his/[her] personal utility."[60] Underpinning this philosophical discourse are concepts of public choice, property rights and principal-agent relationships.[61]

Linked to the cold war and the failure of communist States in Eastern Europe, the 1980s witnessed a rise in economic theories emphasising the potential threat of centralised planning on individual freedom and liberal values. Proponents of privatisation subscribe to certain assumptions about the production and consumption of goods and services. Private sector provision is regarded as the most efficient distributor of goods and services to the public. Some of the touted benefits of privatisation include improving efficiency, reducing the financial burden on the State, developing a market economy and attracting capital and international foreign direct investment in the privatised sectors.[62]

Narsiah argues that such a thesis (of putting faith in the market) is the product of a paradigm shift, engendered by the collapse of the Keynesian welfare State

---

[56] 5.
[57] S Grusky & M Fiil-Flynn *Will the World Bank Back Down? Water Privatisation in a Climate of Global Protest* (2004) 7 <www.worldbankwatch.org> (accessed 17.03.2010).
[58] PF Drucker *The Age of Discontinuity* (1968) 233-234.
[59] Khan *Public vs Private Sector* 1.
[60] 1.
[61] 1.
[62] M Williams "Privatisation and the Human Right to Water: Challenges for the New Century" (2006-2007) 28 *Michigan Journal of International Law* 461 495.

interventionist approaches of the post-Second World War period.[63] Protagonists of privatisation emphasised the pre-eminence of the free market propagated earlier on by Friedrich von Hayek, and later on by his student, Milton Friedman. The economic scholarship of Hayek and Friedman opposed the Keynesian welfare State and its "search for social equity as inefficient, partly dishonest and demoralising for high achievers."[64] In 1944, Von Hayek famously argued that:

> "If 'capitalism' means here a competitive system based on free disposal over private property, it is far more important to realise that only within this system is democracy possible. When it becomes dominated by a collectivist creed, democracy will inevitably destroy itself."[65]

Milton Friedman echoed him 16 years later, arguing that:

> "Historical evidence speaks with a single voice on the relation between political freedom and a free market. I know of no example in time or place of a society that has been marked by a large measure of political freedom, and that has not also used something comparable to a free market to organise the bulk of economic activity."[66]

A new trend thus emerged of questioning the State's dominant role in the provision of goods and services. This new approach manifested itself through the privatisation of goods and services previously distributed under State provisioning. Privatisation also operated in tandem with liberalisation. This entailed the opening up of previously protected industries to competition as well as the relaxation of curbs on the activities of private entities.

Weizsäcker *et al* point out that in an endeavour to promote this emerging neo-liberal paradigm, the most widely used term was "economic efficiency."[67] It is also noteworthy that the efficiency argument, coincidentally the same argument that was used earlier in the century to buttress nationalisation arguments, was successfully deployed to delegitimise State provisioning of goods and services as inefficient. The private sector is viewed as more economically efficient than the public sector.

[63] Narsiah 2008 *Development Southern Africa* 21-22.
[64] Weizsäcker et al *Limits to Privatisation* 5-6
[65] FA Hayek *The Road to Serfdom* (1944) 1 69-70.
[66] M Friedman *Capitalism and Freedom* (1962) 9.
[67] Weizsäcker et al *Limits to Privatisation* 5-6

Additional to the efficiency argument is the robust push for small government and the promotion of private property.[68]

The apostles of neo-liberalism[69] argued that Keynesian deficit spending had led to deepening stagflation, which manifested itself through soaring inflation rates and high unemployment emblematic of the 1970s. Proponents of privatisation further argued against wholesale State involvement in the provision of goods and services. They advocated for a small and efficient State. The argument was that doing so would open up avenues for the private sector to take care of economic growth, technological progress, and the provisioning of goods and services.[70]

3 2 4 2 Early privatisation experiences

Bortolotti *et al* note that in modern times, the first privatisations were undertaken by the Konrad Adenauer government in the Federal Republic of Germany when the German government sold a majority stake in Volkswagen in 1961. Similar privatisation experiments were embarked upon in Chile and Ireland at the beginning of the 1970s.[71] Marko Ruh notes that under the dictatorial military regime of Augusto Pinochet, the Chilean government privatised all enterprises that were under State control in the Allende period. A team of privatisation technocrats in Chile, christened the *Chicago Boys*, were entrusted with overseeing the privatisation programme. The *Chicago Boys* privatised 202 of more than 500 nationalised entities in the first two years of the Pinochet dictatorship.[72]

In Ireland, one of the forerunners to the privatisation movement, the first act of privatisation was the disposal of the Dairy Disposal Company in 1974.[73] By far the greatest story in the history of privatisation played out from 1979, in the United Kingdom (hereinafter referred to as “the UK”) under the Conservative government of

---

[68] See Narsiah 2010 *Antipode* 381.

[69] This dissertation will adopt David Harvey’s definition of neoliberalism as entailing:

> “a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterised by strong private property rights, free markets and free trade. The role of the State is to create and preserve an institutional framework appropriate to such practices.” See D Harvey *A Brief History of Neoliberalism* (2005) 2.

[70] Weizsäcker *et al Limits to Privatisation* 6.

[71] Bortolotti *et al* 2001 *Emerging Markets Review* 110.

[72] The result was that by 1979, nearly all enterprises were under the control of private business and by 1980 only 25 companies belonged to the public sector. See M Ruh *The Transition to Market Economics in Chile* 7 <http://tiss.zdv.uni-tuebingen.de/webroot/sp/barrios/themeC1e.htm> (accessed 11.04.2011).

[73] See SD Barrett *Privatisation in Ireland* (2004) 15 <www.CESifo.de> (accessed 11.04.2011).

Margaret Thatcher. Thatcher's government accomplished the largest-scale privatisation programme in the western world.[74] Perhaps it was due to the pervasiveness, sheer scale and all-encompassing nature of privatisation in the UK that some scholars mistakenly labelled Margaret Thatcher as the pioneer of the privatisation movement.[75] It is however the privatisation movement of the Thatcher government, particularly after 1983 that gave the impetus and inspired the global privatisation movement, starting in the 1980s.

Privatisation emerged as a major issue for policy discussion in the second half of the 1970s due to a convergence of a number of factors. The election of governments in a number of developed countries, most notably the UK and the United States (hereinafter referred to as "the US"), that were ideologically committed to greater use of the market in securing economic objectives undoubtedly accelerated the drive towards privatisation. The rise of conservative governments resulted in a more general shift in favour of neo-liberal perspectives at the expense of the Keynesian welfarism and State-led provision.[76] The faith in market provision as superior to any form of political or administrative co-ordination was fundamental to the thinking of the Conservative governments of Margaret Thatcher in UK and Ronald Reagan in the US. It also provided an ideological underpinning for privatisation, a position followed by other governments across the world, often coerced by the international financial institutions (hereinafter referred to as "IFIs").

In their dismissal of the Keynesian model, proponents of privatisation argued that State intervention in the market does not work. They further argued that all alternatives to markets are deeply flawed since government failure is more prevalent than market failure and, most significantly, State involvement in commerce is likely to result in the violation of individual rights.[77] In the following discussion, I highlight some factors which drove the privatisation agenda.

---

[74] Bortolotti et al 2001 *Emerging Markets Review* 110.

[75] See Meseguer 2004 *Journal of Public Policy* 300. Obadan also points out that:

> "[a]s an economic policy instrument, privatisation of State-owned enterprises began to gain popularity in both developed and developing countries after apparently successful privatisation experiments of the British Conservative Government in the late 1970s to the early 1980s." MI Obadan *The Economic and Social Impact of Privatisation of State-Owned Enterprises* (2008) 1.

[76] Obadan *The Economic and Social Impact of Privatisation* 1

[77] A Gamble "Privatisation, Thatcherism, and the British State" (1988) 16 *Journal of Law and Society* 1 5.

3 2 4 3 Factors driving the privatisation agenda

Some of the factors cited as driving the privatisation agenda included the role of IFIs, particularly the World Bank and the International Monetary Fund (hereinafter referred to as "the IMF") through the so-called Washington Consensus.[78] Since the early 1980s, sentiments in the IFIs and donor agencies changed in favour of privatisation. This was motivated by a change of development paradigms and the alleged mounting evidence of poor performance of public enterprises, resulting in huge deficits on government budgets.[79] As a vital ingredient of the Washington Consensus, privatisation was also pushed as a condition of aid, new loans and debt relief provided by the World Bank and IMF, regional development banks and donor agencies.

Failure to comply with privatisation of some State owned enterprises would result in the withholding of the much needed funds. For instance, the World Bank made it clear in its Private Sector Development Strategy in 2002 that privatisation should include a special emphasis on sectors such as water, energy, healthcare and education.[80] This spawned concerted and widespread attempts to curtail the economic role of the State through privatisation of State owned entities. It is therefore not surprising that privatisation in the 1980s was an integral element of the Washington Consensus. This model of development stressed market rules, deregulation, trade, financial liberalisation, a smaller role for the State and macro-economic stability, among others.[81]

Some of the factors deemed to have contributed to the privatisation impetus include the advent of stagflation[82] in the 1970s which paved the way for a return to economic austerity. Significantly, the widespread collapse of economies as a result of Debt Crisis of the early 1980s provided the justification for reigning in socialism and

[78] Noting that the term "Washington Consensus" was coined by John Williamson, Joseph E Stilgitz, a Nobel laureate, explains the meaning of the term as a set of recommendations made by the international financial institutions and the US Treasury during the eighties and early nineties before they became such a subject of vilification. These involved the development of strategies focusing on privatisation, liberalisation, and macro-stability, implying mostly price stability. Such policies were predicated upon a strong faith in unfettered markets and aimed at reducing, or even minimising, the role of the State in management and distribution of goods and services. See JE Stilgitz *The Post Washington Consensus* (2005) 1.

[79] CV Chang *Privatisation and Development: Theory, Policy and Evidence* (2006) 4.

[80] C McGuigan *The Impact of World Bank and IMF Conditionality: An Investigation into Electricity Privatisation in Nicaragua* <www.christianaid.org.uk> (accessed 11.04.2011).

[81] Obadan *The Economic and Social Impact of Privatisation* 1.

[82] Persistent high inflation combined with high unemployment and stagnant demand in a country's economy.

extending market fundamentalism to developing countries.[83] This thinking is crisply captured by Bakker, where she notes that:

> "By the final quarter of the 20th century, the experience with public management had given rise to a counter-critique of State failure. The notion of an invariably inefficient public sector, together with the fiscal crisis of a State unable or unwilling to finance expenditure, provided a justification of private ownership of infrastructure. The perceived need to improve productive efficiency stimulated the introduction of new management practices that prioritised efficiency gains over other goals such as social equity that had been the focus in earlier periods. This strategy was part of a more generalised trend: the progressive…[privatisation] of a broad range of State functions and welfare services."[84]

The provision of water services has been traditionally regarded as the domain of the State.[85] The past two decades have however witnessed alternatives being sought to ameliorate the perceived short-comings of State provision. Water privatisation as an alternative to public-sector provision has been put into practice, both in the developed and developing world. The following section will discuss the rise in water privatisation and the various forms in which water privatisation has been operationalised.

3 2 5 State management of water supply systems

It is significant to note that States owned and operated most water supply systems, particularly in industrialised countries and urban areas in much of the twentieth century.[86] During the 1970s and 1980s, privatised water systems were very rare. Much of the international funding in the water sector was directed primarily to public entities up to about 1990.[87]

State management and provision of water services emerged after a period of provision by both public and private entities in the nineteenth century. In fact, in some

---

[83] Chang *Privatisation and Development*: *Theory, Policy and Evidence* 4.
[84] KJ Bakker *An Uncooperative Commodity* (2003) 6.
[85] Although private enterprises built and operated the first water supply networks in such cities as Boston, New York, London and Paris, the failure by these private entities to provide universal access to water resulted in governments taking over the management and operation of the water supply infrastructure. These developments are analysed in the following section.
[86] Bakker *Privatising Water* 33.
[87] V Petrova "At The Frontiers of the Rush for Blue Gold: Water Privatisation and the Human Right to Water" (2006) 31 *Brooklyn Journal of International Law* 557 583.

major cities, the first water supply networks were built and operated first by private corporations.[88] Private corporations operated in cities like Boston, New York, London, Paris, Buenos Aires and Seville though such entities predominantly supplied water to wealthier neighbourhoods with the poor left to rely on public faucets, wells and rivers.[89]

3 2 5 1 State justification of ownership

Throughout much of the 19th and 20th centuries, governments assumed responsibility for an ever-expanding range of societal functions. Later during the 19th century and beginning of the 20th centuries, governments also played a crucial role in supplying and maintaining large infrastructure facilities such as transport, communications, health, water supply and sanitation facilities. Some of the early infrastructure projects such as railways and telecommunications had been initially built and owned by private entities and later nationalised.[90]

Nationalisation was one of the key programmatic ideas of communism from the days of the Russian revolution onward, though it took place in many non-communist Western European and Latin American countries. Although ideology may have played a part (since nationalisations in Western Europe often occurred under socialist governments), pragmatic considerations may have played a part as well. It was easier for capital, so went the argument, to be raised cheaply and readily by the State for infrastructure projects. The argument was that public services would be delivered in a more efficient way, if managed in the public interest rather than left to private companies who would inevitably put their individual commercial interests first.[91] It is ironic that arguments used by States in the late 19th and 20th centuries for nationalisation of utilities such as access to capital, the need for efficient provisioning of services, and universal access are the same arguments used to justify privatisation of the same services in the late 20th century.[92]

3 2 5 2 Municipal hydraulic model

Hukka and Katko have pointed out that although the first modern water systems were first built and managed by private corporations in North America and many European

[88] Bakker *Privatising Water* 32-33.
[89] 32-33.
[90] Weizsäcker *et al Limits to Privatisation* 5.
[91] 5.
[92] 5.

countries, in the majority of cases municipalities soon took over the operation and management of such water and sewerage systems.[93] For example, by the early 20th century, 93 percent of water systems in most German urban centres had been taken over by municipalities. The entire water systems in Sweden and Finland were also being publicly managed by municipalities.[94]

Publicly owned water works in the whole of the US was only 6.3 percent in 1800, but rose to a staggering 53 percent by 1896. Major US cities such as New York and Chicago started providing water services with the help of private corporations. In New York, for instance, the Manhattan Water Company was awarded a contract to provide water services for the city at the end of the 18th century.[95] The cities however took over the water system as the private corporations were unable to extend their networks to meet the water needs of the growing urban population or serve the peri-urban areas due to limited financial resources. There was also concern about the public health implications of the private corporations' inability or unwillingness to provide adequate water for other public uses such as street cleaning, fire fighting, and pollution prevention.[96]

Keating notes that in the US, by 1896, about 200 municipalities had taken over the operations of water systems from private enterprises, whereas only 20 municipal water systems had been privatised. In the UK, the private enterprises started operating water systems at the beginning of the 19th century.[97] In England, the first water systems were privately owned.[98] It is however pertinent to note that by the end of the 19th century to the beginning of the 20th century, water operations were largely run by local governments.[99]

Keating pointed to two main justifications for the trend towards public ownership of water supply systems. One of the justifications was grounded on the private sector's inability or unwillingness to invest sufficiently to allow for network extension thereby improving access. The second reason was predicated on private enterprises' unwillingness to provide the poor and marginalised members of society

[93] JJ Hukka & TS Katko *Water Privatisation Revisited*: *Panacea or Pancake?* IRC International Water and Sanitation Centre (2003) 25.
[94] 25.
[95] 25.
[96] 25.
[97] 37.
[98] 37-38.
[99] 37.

basic access to water services which were considered essential for societal well-being.[100]

Bakker notes that for much of the 20th century, the conventional approach for managing water supply systems, in most counties around the world was what she calls "the municipal hydraulic" paradigm of water management.[101] This approach emphasised the deployment of hydraulic technologies to meet the inevitable growth in water demands engendered by modernisation. A commitment to social equity and universal provision necessitated significant government regulation, government ownership and/or strict regulation of water resources development and water supply provision. This was in line with the prevailing arguments in favour of State provision of a broad range of public services, predicated on the recognised advantages of government provision, both political and technical.[102]

The private sector's inability to finance universal provision of water services led to State take-over of water supply infrastructure. In countries such as Spain, France and England, where private entities continued to provide water services (albeit to a limited extent), they operated under tight regulations. Private water corporations in the UK, for example, had their dividends capped and, most significantly, were required to reinvest any remainder in the water supply business.[103] The involvement of the State in the provision of water services was further justified as water is expensive to transport relative to value per unit per volume. This is because water requires large scale capital investments in infrastructure networks (or large sunk costs) hence duplication of the network leads of inefficiency.[104] For example, the Manhattan Company formed to supply water to New York failed to improve access to water for the majority of New Yorkers, often forcing them to rely on unhealthy water from ponds and wells.[105] Snitow and Kaufam have pointed out that this particular company was one of the "most corrupt, incompetent and disastrous experiments in water privatisation on record."[106] Poor monitoring and regulation of this private water supplier is also regarded as having contributed to a series of

[100] 25.
[101] This municipal hydraulic paradigm, according to Bakker, witnessed large scale water resources projects, both in the developed and developing world. Bakker notes that big dams "represented the sinews of the nation-state as they were the source of hydropower that would underpin the driver towards development." See Bakker *Privatising Water* 33.
[102] 31-32.
[103] 32-33.
[104] 33.
[105] 219.
[106] A Snitow & D Kaufam & M Fox *Thirst: Fighting the Corporate Theft of Our Water* (2007) 5.

disasters in New York, including the cholera epidemics of 1832 and 1835.[107] These disasters precipitated the formation of a Board of Commissioners mandated to raise infrastructure capital in order to supply water for the city.[108] In London, for instance, the nine main water companies that supplied the city were hardly regulated. Prasad has pointed out that the private sector was reluctant to supply water to the poor.[109] As a result, the rich had their own supplies whereas the poor were getting water from rivers and wells. It was only in the aftermath of a major cholera outbreak in 1840 that some form of regulation was imposed.[110] Part of the regulation required the private water companies to ensure a continuous supply of filtered piped water to residences.[111]

The result was that States, particularly in the 20th century, created and managed public utilities and, in a number of cases, provided utilities such as water on a subsidised basis. This was carried out with the aim of providing universal access and strengthening public health. In recognition of its public good status, water was regarded as a public service, often run at the municipal level, and was frequently not metered.[112]

The municipal hydraulic model of network water supply provision was, to a certain extent, a response to experiences with private provision of water supply in the nineteenth century.[113] The justification for State control and management of water supply systems thus rested on both economic and ethical arguments.[114] Firstly, in economic terms, the high capital costs of water supply development projects and secondly, the need to enhance equitable access to water justified State involvement. Strong ethical claims were also made in favour of government involvement in the management and distribution of water services. Justifications for such included the

---

[107] Prasad 2007 *Law, Environment and Development Journal* 221.
[108] 221.
[109] 221.
[110] 221.
[111] 221.
[112] Bakker captures the thinking of the day, pointing that:

> "[T]hroughout the 20th century water was viewed as a strategic resource…essential to a nation's development…and as an essential lubricant for industrialisation, urbanisation and agriculture modernisation. This implied the need for large scale infrastructure projects to regulate and supply water. Given the long lead times and scale of investment in water resources and supply infrastructure, government financing was often assumed to be necessary. Moreover, drinking water supply was conceived of as a public good, a necessary precondition to participation in public life, and a material emblem of citizenship." See Bakker *Privatisation* 33.

[113] 34.
[114] 34.

symbolic and cultural importance of water as a non-substitutable resource, essential for life as well as its strategic political and territorial importance.[115] It was also argued that sufficient supplies of water enabled a basic, dignified living standard and facilitated social inclusion hence access to sufficient amounts of clean water came to be viewed as a precondition to participation in public life.[116]

3 2 5 3 Challenges to the municipal hydraulic approach

The municipal hydraulic approach had, by the 20th century, come under severe criticism from interest groups, citing a triad of ecological, cultural and socio-economic arguments. This included the alleged deleterious effects, especially of large dams, on the destruction of species, displacement of communities, flooding of cultural sites and contamination of water sources.[117] Bakker argues that such capital-intensive hydraulic works were particularly susceptible to "pork-barrel politics,"[118] leading to overdesigned "white elephant" projects. Such entities would require heavy subsidies from the State for both capital and ongoing operational costs.[119]

It is noteworthy that the same reasons used to justify State takeover of the water supply and management in the early 20th century were the same reasons used to justify privatisation of water services later in the century. These included the alleged failure by State-owned enterprises to extend universal access to water and the failure to invest adequately in water supply infrastructure. This, according to proponents of water privatisation, resulted in the so-called State failure.[120] This manifested itself through low coverage rates, low rates of cost recovery, uneconomic tariffs, underinvestment, deteriorating infrastructure, overstaffing, inefficient management and lack of appropriate response to the needs of the poor.[121]

3 2 6 Water as an economic good

Water has been regarded as the last frontier of privatisation across the world.[122] The world water crisis highlighted in the previous chapter saw the IFIs, in collaboration

---

[115] 34.
[116] 35.
[117] 35.
[118] "Pork barreling" is a term referring to the appropriation of government spending for localised projects secured solely or primarily to bring money to a representative's district.
[119] Bakker *Privatising Water* 44-45.
[120] 87.
[121] 87.
[122] Petrova 2006 *Brooklyn Journal of International Law* 557.

with donor agencies and regional development banks, vigorously pushing for privatisation of water supply services.[123] They promoted the involvement of multinational water corporations in particular as the panacea to the global water crisis.[124] The private sector was viewed as bringing the much needed financing, efficiency, management skills and technology to the water services sector.[125] Water privatisation therefore became the centrepiece of the IFIs, so-called water think tanks and donor agencies' policies in the water sector.[126] This insistence on water privatisation was based on perceived State inefficiency.[127]

The premises underlying the privatisation drive in water services is the expansion of tradable goods to include water. This has resulted in the reconceptualisation of the utility sector as a profitable business rather than a provider of public goods which may require subsidies.[128] The global water scarcity is depicted as justifying the privatisation of water and adoption of cost-reflective pricing.[129] What these IFI-inspired neo-liberal water sector reforms sought to do was place greater reliance on pricing and thereby full cost recovery of water services even for those least able to pay. This was part of stripping the State of its primacy in the provision of water services. The conceptualisation of water as an economic good, and full cost recovery as its corollary, opened up the water sector to privatisation, lately referred to as PPPs.

The notion of regarding water as an economic good implies that all water services are based on the principle of full-cost recovery.[130] The principle of full-cost

---

[123] See P Bond "Water Commodification and Decommodification Narratives: Pricing, Policy Debates from Johannesburg to Kyoto to Cancun and Back" (2004) 15 *Capitalism Nature Socialism* 7 8.

[124] See Petrova 2006 *Brooklyn Journal International Law* 557 578-580; Bakker 2007 *Antipode* 431; Williams 2006-2007 *Michigan Journal of International Law* 46. Petrova points out that water services privatisation has been consolidated within the stewardship of a few water multinational companies, particularly from France and UK, and lately Germany.

[125] See Lundqvist 1988 *Journal of Public Policy* 7. See also P Parker "The New Right, State Ownership and Privatisation: A Critique" (1995) 8 *Economic and Industrial Democracy* 349-378 who argues that arguments about privatisation improving service performance and public finances remain uncorroborated as privatisation may run counter to what its proponents claim. The author cites the privatisation of the British Council housing as well as the privatisation of the public transport in Britain as a case in point.

[126] Grusky & Fiil-Flynn *Will World Bank Back Down*? 1.

[127] The World Bank pointed to what it perceived as flawed management by the State and structural defects in public sector management of water as being responsible for the well-documented poor quality and low penetration of water supply systems. See World Bank *The State in a Changing World: World Development Report* (1997) 64.

[128] Bakker 2007 *Antipode* 433.

[129] 435.

[130] EB Bluemel "Implications of Formulating Human Right to Water" 2004 (31) *Ecology Law Quarterly* 957 962.

recovery seeks the recovery of all costs related to the provision of water, primarily operationalised through the pricing of water. This also entails the removal of subsidies as all costs are maintained in order to calculate fixed and variable costs.[131] The strategy is used to determine the costs of production and to effect full cost recovery. Such costs need to be calculated so that performance and profit may be scientifically determined. Such a process is collectively referred to as ring-fencing.[132]

The 1992 International Conference on Water and the Environment adopted what became known as the "Dublin Statement."[133] Although not legally binding, it became an extremely important tool in the conceptualisation of water as an economic good. Principle 4 in particular provides that:

> "Water has an economic value in all its competing uses and should be recognised as an economic good...Managing water as an economic good is an important way of achieving efficient and equitable use."[134]

The World Bank adopted the economic good model of the Dublin Statement as its guiding principle. It introduced the principle of full cost recovery - a corollary of applying the economic good model – as part of its conditionalities for loans in the water sector, especially in the developing world. The principle of full cost recovery meant that the State or non-State supplier of water services should be able to recover the full costs of supplying water to all users.[135] The proposal to treat water as an economic good is predicated on the belief that treating it as such would, firstly, ensure access to water resources for all.[136] Secondly, it would minimise inefficiencies through pricing techniques. The reasoning is that apart from minimising waste, higher prices will encourage only those uses which are most valuable, thereby increasing

---

[131] 963-964.
[132] Narsiah 2008 *Development Southern Africa* 21 23.
[133] In 1992, the World Meteorological Organisation held an International Conference on Water and Environment in Dublin and the result was the Dublin Statement articulating various principles on water resources management. The Dublin Statement was commended to world leaders participating at the UN Conference on Environment and Development in Rio de Janeiro <http://www.gdrc.org/uem/water/dublin-statement.html> (accessed 03.04.2010) (hereafter the "Dublin Statement.")
[134] See the Dublin Statement. Peery, Rock and Seckler have pointed out that principle 4 of the Dublin Statement represented a compromise between those, mainly economists, who wanted to treat water in the same way as other private goods, subject to allocation through competitive market pricing, and those who wanted to treat water as a basic human need that should be largely exempted from competitive market pricing and allocation. See CJ Perry, M Rock & D Seckler *Water as an Economic Good: A Solution, or a Problem*? (1997) 1.
[135] Bluemel 2004 *Ecology Law Quarterly* 964.
[136] 962.

the total amount of water resources for use by households.[137] This entailed introducing the cost recovery principle within the tariff system and opening up the water sector for private sector involvement and foreign investment.[138]

Scholars and human rights activists reacted differently to this proposition of treating water as an economic good as discussed in chapter 2.[139] Perry *et al* argued that the question should not be whether water is an economic good or not as there is no doubt about the status of water as an economic good.[140] The three authors argue that the germane question to be asked is whether water is a purely private good that can be left to free market forces, or "a public good that requires some amount of extra-market management to serve social objectives."[141] Proponents of water as an economic good argue that water is just like any other good. They argue that its production and allocation should be determined by the overriding value of consumer's sovereignty, "that is by the amount that people are ready, willing, and able to pay for it."[142] The criterion of consumer's sovereignty is unacceptable as it ignores inequitable income distribution in society.[143] The result is that the poor and marginalised in society who are unable to pay as much for a unit of water as the rich end up quantities below their basic water needs.

Bluemel points out that the principle of full-cost recovery is likely to price water out of the reach of some poor and marginalised communities.[144] This may curtail their access to an adequate supply of safe water necessary to meet their basic needs.[145] Some scholars have pointed out what they perceive as an inherent contradiction in regarding water as both an economic good and a human right.[146] This is because full

---

[137] 962.
[138] See Bond 2004 *Capitalism Nature Socialism* 8. For further discussion of the principle of cost recovery within the water delivery and management sector, see also Petrova 2006 *Brooklyn Journal International Law* 578-580; K Bakker "The `Commons' versus the `Commodity': Alter-globalization, Anti-privatization and the Human Right to Water in the Global South" (2007) 39 *Antipode* 430 431; Williams 2006-2007 *Michigan Journal of International Law* 461; JW Visser & C Mbazira (eds) *Comparing Water Delivery in South Africa and the Netherlands* (2006); M Barlow & T Clarke *Blue Gold: The Fight to Stop the Corporate Theft of the World's Water* (2002) 7; J Rothfeder Every *Drop for Sale: Our Desperate Battle Over Water in a World About to Run Out* (2004) 23-24 & V Shiva *Water Wars: Privatisation, Pollution and Profit* (2002)5-7.
[139] See section 2 2 above in chapter 2 for a discussion of the origins and the debate surrounding the conception of water as an economic good.
[140] Perry et al *Water as an Economic Good* 1.
[141] 1.
[142] 2.
[143] 2.
[144] Bluemel 2004 *Ecology Law Quarterly* 963.
[145] 963.
[146] A Kok "Privatisation and the Right to Access to Water" in K De Feyter & FG Isa (eds) *Privatisation and Human Rights in the Age of Globalisation* (2005) 259 262.

cost recovery may lead to the removal of State subsidies and to the implementation of full cost recovery measures. Such measures may affect the poor and vulnerable disproportionately, and result in increased disconnections of water due to non-payment, and a decrease in the quality of service.[147] This would constitute a breach of the right of access to water.[148] An alternative argument, to be fully canvassed below in the human rights analysis of privatisation, is represented by scholars like Vandenhole and Wilders. They argue that considering water as an economic good is not necessarily in conflict with the human right to water.[149] Williams supports this approach by pointing out that there is no formal contradiction between the human right to water and water privatisation of water services.[150] International human rights treaties from which the right to water has been derived do not specify the mechanisms for the delivery of water services.

What is of significance is that the conceptualisation of water as an economic good, and full cost recovery as its corollary, opened up the water sector to privatisation, of late characterised as PPPs.[151] This created the justification and impetus for the privatisation of water supply services to local and multinational water enterprises through various contractual arrangements such as leases, joint ventures and management contracts.[152] These major forms of privatisation are discussed in section 3 3 below. The following section provides a global overview of the extent of water privatisation across the world.

3 2 6 1 Extent of water privatisation

The degree of water privatisation across the world is significant. Grusky and Fiil-Flynn have noted that from 1990-1997 over one hundred World Bank-inspired water projects with private participation were undertaken, with a total investment of US$ 25 billion.[153] The water and sanitation sector constituted 18 per cent of all private

[147] See W Vandenhole & T Wilders "Water as a Human Right-Water as an Essential Service: Does it Matter?" (2008) 26 *Netherlands Quarterly of Human Rights* 391 403.
[148] For an in depth discussion see section 2 2, chapter 2.
[149] The two authors point out that "the qualification as an economic good does not mean that water should be sold at the highest price or that water services should be liberalised and privatised, but in principle simply indicates that it is scarce." See Vandenhole & Wilders 2008 *Netherlands Quarterly of Human Rights* 421.
[150] Williams 2006-2007 *Michigan Journal of International Law* 493.
[151] See Public Citizen *Water Privatization Fiascos: Broken Promises and Social Turmoil* (2003) 1.
[152] Williams 2006-2007 *Michigan Journal of International Law* 492-493.
[153] Bakker 2002 *Environmental and Planning* 771.

infrastructure projects, ranking third behind the telecommunications and power sectors.[154]

A global review study carried out on the privatisation initiatives in the water sector between 2000 and 2004 clearly shows the pervasive nature of the water privatisation agenda. The World Bank lent over US$ 1,26 billion to water and waste water service delivery in Asia.[155] Ninety-five percent of these loans were conditioned on increased cost recovery and 88 per cent promoted increased private sector involvement.[156] During the same period, the World Bank lent a total of US $ 1 billion to 14 African countries in respect of which 80 per cent promoted full-cost recovery and 100 percent championed increased private sector involvement.[157] In Latin America, loans targeted towards the water and sanitation sectors to the tune of US $ 5, 73 billion were granted to a total of eight countries accompanied with the same explicit conditions promoting full-cost recovery and privatisation.[158]

Some of the more notable privatisation initiatives in the water sector included the privatisation of the Jakarta water supply and management to a French water multinational entity, the privatisation of the provision of water and sewerage services in Cochabamba (Bolivia), Dar es Salaam (Tanzania) and Manila (The Philippines). These are discussed further in section 3 5 below. The introduction of water markets in Chile, the sale of publicly owned water companies to private entities in England and Wales and the introduction of so-called PPPs in South Africa are some of the other major privatisation initiatives.[159]

It has been noted above that water privatisation has been preceded by the treatment of water as an economic good. The Dublin statement, in particular principle 4, was pivotal in this regard. The corollary of conceiving water as an economic good

---

[154] 769.
[155] Grusky & Fiil-Flynn *Will World Bank Back Down*? 7.
[156] 7.
[157] 10. These African countries are Burkina Faso, Chad, Comoros, Ghana, Guinea, Guinea Bissau, Mauritania, Malawi, Mozambique, Nigeria, Rwanda, Senegal, Tanzania and Tunisia.
[158] Grusky & Fiil-Flynn *Will World Bank Back Down*? 12.
[159] Bakker 2002 *Environmental and Planning* 769. In the case of South Africa, Bond notes that:

> In small towns and cities like Dolphin Coast, Nkonkobe and Nelspruit, which were meant to be model private participation pilot projects, participation with international water companies were failures. In Nkonkobe, Suez was tossed out entirely…(due) to popular protest by ending the company's contract nearly two decades ahead of schedule. In Dolphin Coast, Saur insisted on a controversial contract rewrite to assure higher profits. In Nelspruit, Biwater was on the verge of withdrawing because of high levels of consumer dissatisfaction and non payment. In Johannesburg, riots erupted in August 2003 when the company attempted to install prepaid meters and shallow sanitation system in Orange Farm and Soweto." See Bond 2004 *Capitalism Nature Socialism* 19.

is the application of market principles and the concept of full cost recovery in water provision. This opens the way for corporatisation and privatisation of water services. The key policy challenge lies in ensuring that cost recovery objectives do not constitute a barrier for the poor to access services. This issue will be fully canvassed in section 3 4 below where I discuss the arguments for and against the privatisation of water services. The following section will discuss the role of IFIs such as the World Bank in pushing for water privatisation followed by the conclusion.

3 2 6 2 The Role of the World Bank in water privatisation

The World Bank began granting loans in the water sector from mid-1960s, albeit at a slower pace than would follow in the ensuing decades.[160] Throughout this period the focus was on funding urban water supply projects. Urban water supply projects were selected based on their presumed ability to recover costs through charging for services.[161] The World Bank's shift and its embrace of privatisation in the 1990s created the necessary impetus for wide-spread water privatisation. It is significant to note that earlier on, the World Bank's activities were almost exclusively focused on financial support for public enterprises. The 1980s witnessed a pendulum shift, with the bank pushing for privatisation of public enterprises, an approach triggered by its so-called private sector development strategy.[162]

The World Bank's shift towards intensification in the funding of water infrastructure is observable, and of particular note is the World Bank's 1971 agreement with the World Health Organisation (hereinafter referred to as "WHO") on water supply and sewage disposal.[163] The creation of the United Nations Development Programme-World Bank Water and Sanitation Programme in 1977 (an offshoot of the Mar Del Plata UN Water Conference discussed in chapter 2)[164] is an example of this paradigm shift.[165] The focus was on water projects in rural areas in the 1980s, particularly with the World Bank's so-called poverty lending. Further impetus was created by the need to complement efforts towards the goals set during

[160] See Bakker *Privatising Water* 66.
[161] Bakker notes that there were only two World Bank funded water projects between 1961 and 1970. See Bakker *Privatising Water* 66.
[162] See generally World Bank *Private Sector Development Strategy-Directions for the World Bank Group* (2002) <http://rru.worldbank.org/Documents/PapersLinks/699.pdf> (accessed 26.03.2010).
[163] Bakker *Privatising Water* 71.
[164] See section 2 5 5 2 2, chapter 2.
[165] See Bakker *Privatising Water* 71.

the UN Drinking Water and Sanitation Decade.[166] Bakker notes that by 1988, the World Bank's water projects represented 10 percent of total projects.[167]

The resulting shift in World Bank policy towards water privatisation was captured in the bank's new strategy paper released in 1993.[168] Specifically, the new strategy signalled the World Bank's move away from support for public enterprises. The new emphasis was on liberalisation and privatisation as the key elements of its reform agenda.[169] Particularly ominous was the bank's adoption of the Dublin Principles with its assertion that water should be recognised as an economic good. This was consistent with the World Bank's new approach, advocating for privatisation and the resort to market mechanisms for the management and distribution of water resources.[170]

The World Bank's involvement in the water sector through the advancement of loans towards water sector projects surged dramatically in the 1990s. The municipal hydraulic approach discussed above was replaced by a new approach focusing on, *inter alia*, privatisation, treatment of water as an economic good, full-cost recovery, elimination of cross subsidies, and the introduction of water rights.[171] The role of the State shifted from that of operator to regulator, whose key role was standard setting, as opposed to the direct provider of water services. This new approach in the water supply and management architecture necessitated reforms in water related legislation. In addition, the World Bank advocated for the adoption of business models for water supply utilities, and the introduction of cost-related tariffs for

---

[166] Bluemel 2004 *Ecology Law Quarterly* 961. A UN General Assembly resolution adopted in 1980 declared the period 1981–1990 as the International Drinking Water Supply and Sanitation Decade, "during which UN member States will assume a commitment to bring about a substantial improvement in the standards and levels of services in drinking water supply and sanitation by the year 1990." The UN General Assembly followed up on the matter and issued Resolution 40/171 on 17 December 1985 as a middle-of-the-decade reminder to the States in which it implored them to work extremely hard to meet the commitments made under the International Drinking and Water Supply Decade as "significant progress towards meeting the objectives of the Decade by 1990 will require a much greater sense of urgency and priority on the part of Governments and the continued support of the international community." See UN *International Drinking Water Supply and Sanitation Decade* UN Doc A/RES/40/171 (1985).

[167] Bakker *Privatising Water* 71.

[168] See International Bank for Reconstruction and Development/World Bank *Water Resources Management* (1993) <www.ielrc.org/content/e9306.pdf> (accessed 02.06.2010).

[169] Bakker points out that this new approach signalled an abandonment of the World Bank's earlier approach in which it sought to strengthen the quality of pubic management and not perpetuate the public versus private ownership dichotomy. The pressure exerted on the World Bank, particularly from the US, also resulted in an increased emphasis on privatisation. See Bakker *Privatising Water* 70.

[170] 69-70.

[171] 71.

irrigation and drinking water.[172] In a number of these cases, for instance in Indonesia, Tanzania, Bolivia and The Philippines, structural adjustment loans were predicated on water privatisation.[173]

3 2 7 Conclusion

Privatisation as a political and economic concept, is inherently ideological and not merely a term descriptive of a purely technical process. The preceding sections discussed the concept of privatisation and the definitional problems associated with the concept. I discussed the spur in privatisation efforts, particularly from the mid-1970s and gaining momentum in the 1980s and 1990s. One of the most significant and controversial global trends in the water sector in the past two decades has been the accelerating transfer of distribution and management of water services from public enterprises to private enterprises, particularly represented by multinational water corporations.

Private investment in utilities such as water is not something new. As shown above, some of the earlier waterworks were built and operated by private companies. States assumed ownership and management of water facilities throughout much of the 20th century. This was mainly predicated on the private corporations' inability to extend water coverage to the unserved and the underserved.[174] These private operators were insufficiently regulated. As a result, "[p]rivate management implied leaky water pipes, pollution and disease."[175]

The preceding sections also discussed the rise of water privatisation and the significant role played by IFIs such as the World Bank, IMF, donor agencies and so-called water think tanks in vigorously pushing the case for water privatisation across the world. Privatisation and corporatisation of water services, if not properly implemented, is clearly not the panacea to the water crisis. This is demonstrated by some of the public health implications engendered by high tariffs as a result of pursuing full cost recovery mechanisms and the installation of pre-paid water metres.

---

[172] 71.

[173] Bakker notes however that the World Bank's new approach did not address the challenges posed by water supply and management, particularly the difficulty of balancing full cost recovery with access to an adequate water supply, particularly by the poor and impoverished members of the community and the associated health implications as well as the high capital costs combined with low returns from water investments. See Bakker *Privatising Water* 71.

[174] See section 3 2 5 for a comprehensive discussion.

[175] N Prasad "Privatisation of Water: A Historical Perspective" (2007) 3 *Law, Environment and Development Journal* 217 221.

The cholera outbreak in Kwa-Zulu Natal in August 2000 was directly linked to the installation of prepaid water meters.[176] The installation of prepaid water metres led to a rash of disconnections of thousands of people from their previously free water supply. This impeded the less privileged communities' access to clean and safe water. The cholera outbreak resulted in the infection of 120 000 and left 300 people dead.[177] In addition, issues of equity, particularly access to water by the marginalised and poor members of society come into play. The various forms of water privatisation that have been implemented across the world will be discussed in the next section. This will be followed by a discussion of arguments that have been deployed to advance or in opposition to water privatisation.

3 3 Forms of water privatisation

Water privatisation is effected through various mechanisms. The privatisation of water services typically exhibits a continuum of possible institutional arrangements, with full State control and management at the one extreme of the continuum, and private ownership at the other end, while in between are various shades of so-called PPPs.[178] Privatisation thus should not be understood in a binary fashion as either the State owns and runs a service or the private sector does. Rather, water privatisation must be understood as a continuum of public and private mixes with varying degrees of involvement by the two sectors.[179]

There are two main models of privatisation in the water sector, the French model and the British model. Divestiture, euphemistically referred to as the British model, was a privatisation model adopted in the UK under the Conservative government of Margaret Thatcher in the late 1980s. The British model involves the outright sale of assets to a private sector operator. McDonald and Ruiters point out that monitoring and regulatory oversight in this model of privatisation remains the

[176] D McKinley "The Struggle Against Water Privatisation in South Africa" in B Balanya, B Brid, H Olivier, K Satoko & T Phillip (eds) *Reclaiming Public Water: Achievements, Struggles and Visions from Around the World* (2005) 181 184.
[177] 184.
[178] See OA K'Akumu "Privatisation Model for Water Enterprise in Kenya" (2006) 8 *Water Policy* 539 542.
[179] DA McDonald & G Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005) 15.

responsibility of the State despite the disposal of the facilities.[180] The importance of monitoring and regulating water services providers is discussed in chapters 6.[181]

Most privatisation arrangements nowadays do not involve any transfer of State assets to the private sector. Rather, the arrangements focus instead on the transfer of operational and managerial functions to the private sector.[182] The water infrastructure and equipment typically remain in public hands, or are transferred back to public ownership after a contractually agreed period.[183] Alternatively, there may be joint responsibilities between the State and the private entity in managing operations and functions, in the form of a joint venture. Most water privatisation agreements involve different mixes of PPPs, often tailored to suit the specific needs of the State and the private operators.[184] This privatisation arrangement is euphemistically referred to as the French model.The French model, the most common around the world, takes a variety of forms of private sector participation. These include management contracts, leases and/or subcontracting specific activities to private actors. The other, less popular privatisation model is the Build-Operate-Transfer (BOT). The different types of privatisation arrangements are elaborated on more fully below.

The degree of private sector participation varies from one form of privatisation to the other.[185] Within the African context, there has been experimentation with the service contract in Burkina Faso; management contracts in Uganda, Kenya, South Africa and Zambia; the lease contract in Tanzania; and concession contract in Mali. What is noteworthy about the contractual arrangements is that these privatisation agreements involve different mixes of PPPs, often tailored to suit the specific needs of the State and the private operators.[186] In the following section, I discuss these major forms of privatisation.

[180] 15.
[181] See section 6 5, chapter 6.
[182] 14.
[183] 14.
[184] 14.
[185] 14.
[186] 14.

3 3 1 The Service Contract

In a service contract, the public sector still retains ownership, control and responsibility for capital. The public sector also bears the commercial risk.[187] The public sector further retains overall responsibility for the operation and maintenance of the system, but contracts out to the private sector administrative tasks such as meter reading, billing and payment collection.[188] The fees in a service contract are normally fixed per unit of work and are usually agreed upon in advance. Due to their low requirement for capital investment by the private entity, these privatisation arrangements normally range from a period of one to two years.[189] Service contracts by their nature ordinarily allocate the least responsibility to the private entity in comparison to other contractual arrangements since the private entity is responsible for specific tasks.[190]

3 3 2 The Management Contract

Although similar to the service contract, the private entity, under a management contract, takes over the operations and management of the entire water system.[191] Capital investment and expansion of the system remains the responsibility of the public sector. Although the private entity is free to make any management decisions it deems fit in respect of water supply, it remains immune from any attendant commercial risks, with the State bearing the brunt.[192] The payment for a management contract can be fixed or performance related, for instance, the private entity can be paid per volume of water sold or per number of new connections to the water supply network. Management contracts are mainly used in cities and countries that private water companies consider too risky for long term investment.[193] Management contracts may be initiated as a way of testing the investment environment and later upgraded into concession arrangements.[194] The duration of a

---

[187] 14.
[188] E Perard & F Mattei *Private Sector Participation and Regulatory Reform in Water Supply: The Middle East and North African (MEDA) Experience* (2008) 9.
[189] K'Akumu 2006 *Water Policy* 544.
[190] See M Akech *Privatisation and Democracy in East Africa* (2009) 54.
[191] E Perard & F Mattei *Private Sector Participation* (2008) 9.
[192] K'Akumu 2006 *Water Policy* 544-545. Akech notes that the compensation of the private entity is not linked to operational efficiency or cost management. See Akech *Privatisation* 54.
[193] 544-545.
[194] Management contracts, like the service contracts are normally used in situations where the private sector considers it too risky to invest. See Akech *Privatisation* 54.

management contract typically would last three to five years.[195] An example of this contract was the arrangement between the French water giant Suez and the City of Johannesburg, South Africa for the management of Johannesburg's water supply. The management agreement was not renewed after its expiry in 2006.[196]

3 3 3 The Lease Contract

Under this form of privatisation arrangement, the public sector leases out the water utility to a private operator and the latter assumes the legal responsibility for the operation, maintenance and management of the water delivery system.[197] However, with a lease contract, the public sector retains ownership of the assets and is responsible for capital investment. The compensation payable to the private operator is determined by the private operator.[198] It is noteworthy, however, that water users become direct clients of the private entity. The latter collects the tariffs, pays the lease fees to the public sector and retains the balance. In this kind of privatisation arrangement, the private operator bears a significantly greater portion of the commercial risks than in the management contract.[199] A lease contract is ordinarily longer in duration and may last eight to fifteen years.[200]

3 3 4 The Concession Contract

In a concession contract, the private contractor has overall responsibility for the utility, including expansion and rehabilitation of the network as well as normal maintenance.[201] The duration of the contract normally ranges from twenty to thirty years. Ownership remains with the public sector which assumes possession at the end of the contract period.[202] This long contract period is to enable the private operator enough time to recoup its capital investment as well as make a profit. In the case of a concession contract, the private entity operates the water system at its own commercial risk.[203] In practice, private operators always seek to ameliorate the potential risks associated with operating a water utility by negotiations and in

[195] E Perard & F Mattei *Private Sector Participation* (2008) 9.
[196] K'Akumu 2006 *Water Policy* 544-545.
[197] Perard & Mattei *Private Sector Participation* 9.
[198] Akech *Privatisation* 54
[199] Perard & Mattei *Private Sector Participation* 9.
[200] K'Akumu 2006 *Water Policy* 545.
[201] 545.
[202] Perard & Mattei *Private Sector Participation* 9.
[203] See Akech *Privatisation* 54. This is unlike in a lease contract where the risks are shared between the public authority and the private actor.

contractual agreements with the public sector.[204] In this type of privatisation arrangement, the State only assumes the role of regulation and monitoring during the duration of the contract period. An example of a concession contract can be found in the Philippines capital, Manila discussed in section 3 5 3 below.

3 3 5 Build-Operate-Transfer

The Build-Operate-Transfer (hereinafter referred to as "BOT") contractual arrangement involves the private entity designing, building, financing and operating a project from scratch.[205] The BOT involves transfer from the private sector to the public sector after a contractually specified period of time.[206] The private operator has to operate and maintain the infrastructure for a concession period during which it is expected to recoup its investments before handing over the facility to the State. In the water sector, BOT arrangements are normally employed for water and sewage treatment plants rather than for building water distribution networks.[207]

3 3 6 Joint venture

In the case of a joint venture, the State or municipality and the private entity jointly form and co-own a water operator in the form of a private company.[208] This can be an acceptable solution in a situation where full-scale privatisation faces resistance. The joint company thereafter may directly undertake provision of water services as a private entity and the two shareholders share the responsibilities and benefits.[209] Monitoring and regulation of joint ventures is typically performed by a parastatal regulatory body.

3 3 7 Divestiture (the English–Welsh model)

The divestiture model of privatisation has been implemented in only a few cases. Divestiture is the extreme form of privatisation as it involves the outright sale of assets to a private company that takes over the operations and maintenance on a permanent basis.[210] With this form of privatisation, which is to be found in England

[204] K'Akumu 2006 *Water Policy* 545.
[205] Perard & Mattei *Private Sector Participation* 9.
[206] K'Akumu 2006 *Water Policy* 546.
[207] 546.
[208] Perard & Mattei *Private Sector Participation* 9.
[209] K'Akumu 2006 *Water Policy* 546.
[210] See J Wackerbauer *Regulation and Privatisation of Public Water Supply and Corresponding Competitive Effects.* Institute for Economic Research (2005) 5-6.

and Wales, publicly operated monopolies are transferred as a whole to a private provider.[211] The utility is operated on business principles. In the case of a divestiture, the State is only left with the regulatory and monitoring roles, while the private sector takes over ownership, control and capital responsibilities. This model has been implemented in England and Wales with the privatisation of all ten of the large publicly owned water utilities in 1989.[212]

In African countries, the bulk of water privatisation contracts have been in the form of management and lease contracts. It appears the main reason for this preference is because private operators are disinclined to invest in more demanding options such as concessions and BOT contracts. This is due to the perceived high risks associated with investing in developing countries.[213]

Water privatisation has engendered fierce controversy between proponents of privatisation who assert that privatisation of water services will lead to better performance. On the other hand, are opponents of privatisation who oppose private ownership and management of water services. They argue that State-run water supply systems when properly resourced are more effective and equitable. The following section will discuss the arguments that have been advanced in favour of and against privatisation of water services.

3 4 Arguments for and against water privatisation

3 4 1 Introduction

Privatisation in the provision of water services has triggered vigorous debates, criticism, and intense scrutiny of the participation of the private sector in water provision. Privatisation debates have become more protracted and heated, in part because of the dramatic increase in privatisation of water supply services. The privatisation conditionality and other pro-market reforms embedded within these structural adjustment programmes opened the way for some of the world's largest water multinationals corporations (hereinafter referred to as "MNCs") to expand their operations and ownership of water supply systems in the developing world.[214]

[211] In England and Wales ten water service companies were created in this manner and their shares were sold on the stock exchange.
[212] K'Akumu 2006 *Water Policy* 546.
[213] See Akech *Privatisation* 54.
[214] Bakker *Privatisation* 2.

On one side of the debate, it is argued that water is a public good and a unique resource essential for life and health and thus should not be privatised. Rather, it should remain in the public domain. The other side to the contestation argues that the private sector can contribute to the necessary investments in the sector, and thus extend coverage to currently unserved or under-served areas. Additionally, it is argued that the private sector has the necessary capacity to increase service quality and efficiency, contribute technologies and skills to the sector, and provide services at lower prices.[215] The following section will highlight the debates that have been generated, particularly as a consequence of the privatisation of water services. Three streams of arguments generally identifiable from the literature are highlighted below.

3 4 2 Objections to water privatisation

The World Bank, donor agencies and development banks' promotion of water privatisation, as noted above, has contributed to a growing anti-privatisation social movement.[216] This movement vehemently opposes the privatisation of water. It argues that water is a human right, a public good, and part of the global commons and not a commodity that can be bought and sold for profit.[217] It is argued that the involvement of private entities introduces the pernicious logic of the market into water management which is incompatible with guaranteeing the right to water.[218] Opponents of the water privatisation tend to point out that the focus on privatisation and cost recovery ignores the need to protect the poor and enhance universal access to water.[219] To buttress their arguments, they cite examples from Argentina, Bolivia, The Philippines, Ecuador, Atlanta and South Africa to show that water privatisation initiatives can have disastrous consequences. They cite unaffordable water rates, public health crises and social turmoil.[220]

---

[215] See United Nations Human Rights Council *Report of the UN Independent Expert on the issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation* (2010) UN Doc A/HRC/15/31 para 7 (hereinafter "Special Rapporteur report").
[216] Bond 2004 *Capitalism Nature Socialism* 19.
[217] Grusky & Fiil-Flynn *Will World Bank back down*? 3.
[218] For an overview of the water anti-privatisation debate see Petrova 2006 *Brooklyn Journal International Law* 578-580.
[219] Grusky & Fiil-Flynn *Will World Bank back down*? 3.
[220] 1.

3 4 2 1 Market failure

The main argument in favour of State provision of water services is predicated on the economic concept of market failure. The market failure concept posits that markets alone are unable to efficiently allocate goods and services.[221] Market failure is said to arise in circumstances that fail to correspond with standard assumptions, resulting in effects that are unaccounted for by economic actors.[222] It is therefore argued that water requires heavy infrastructure networks and is heavy to transport.[223] This constitutes an effective barrier to market entry thereby ruling out any competition. The corollary is that water supply becomes susceptible to monopolistic control. It therefore, follows that privatisation of water services, unlike other utility services, is fraught with difficulties, not least the tendency by private actors to abuse the monopolistic nature of water supply which might manifest itself in overpricing.[224]

The argument is that access to water has important implications for hygiene and public health. This becomes particularly significant in light of the tendency of private actors, due to profit considerations, to cherry-pick profitable neighbourhoods, resulting in the overlooking of poor neighbourhoods. This trend has also been addressed by the UN Special Rapporteur on the right to water and sanitation in her 2010 report in which she pointed out that private service providers often select attractive areas within regions, countries, cities and neighbourhoods where a high rate of return can be expected.[225] As indicated in the discussions above, this was one of the main arguments which justified public control of water supply and sanitation systems from the private sector during the 19th century.[226]

3 4 2 2 The accountability argument

The anti-water privatisation lobby also employs the accountability argument in opposition to water privatisation. The accountability lacuna in respect of non-State actors means that such entities are only accountable to their shareholders and not to the water users. This will become relevant in the section below where this work discusses some instances of water privatisation and the lack of accountability

[221] Bakker *Privatisation* 42.
[222] 42.
[223] 42.
[224] 42-43.
[225] See Special Rapporteur Report para 39.
[226] Bakker *Privatisation* 42-43.

experienced as a consequence of arbitration clauses often contained in privatisation contracts.

It is contended that privatisation of public services such as water results in a democratic deficit due to its foreclosure of accountability to citizens.[227] Non-State actors involved in the provision of water services are most likely to be accountable to their shareholders. The former may not be sensitive to social equity concerns such as access to water services by the poor and vulnerable members of society. The contention is that managers in the private sector are only accountable to their shareholders and that such accountability is largely in terms of profits. Consequently, the desire to make profits motivates private enterprises to invest in areas that are likely to bring substantial returns on their investments. Private enterprises are unlikely to invest in water services where profit margins are likely to be minimal. The above was reflected by Biwater's withdrawal from the water privatisation project in Zimbabwe, citing lack of financial viability of the proposed project.[228]

In many developing countries the bulk of the population is poor and live below the poverty datum line. It is virtually impossible for private corporations to meet shareholders' profit expectations and at the same time implement universal coverage with acceptable quality and affordable water. The private sector has few incentives to improve access to water when large swathes of the population are very poor. This is so given that investment costs in water are too high to expand access and the future revenue flows will be low.[229] The anti-water privatisation group thus opposes the commodification of water. It endorses the human right status of water, claiming that water is a *res publica*, a "patrimonial good vital to all humanity...and therefore an inalienable individual and collective right."[230]

---

[227] 138.

[228] See K Bayliss "Privatisation and Poverty: The Distributional Impact of Utility Privatisation" *Centre on Regulation and Competition, Working Paper Series No 16* (2002) <http://idpm.man.ac.uk> (accessed 05.04.2010). It has been pointed out that the real reason for Biwater's decision to dump the Zimbabwe water privatisation project was due to lack of agreement on the tariffs it was going to charge for water consumption. Bayliss argues that "The UK firm Biwater withdrew from a water project in Zimbabwe because people were too poor to pay the minimum price Biwater wanted for its water; the profit margin wasn't big enough." See "Privatisation and Profit in Developing Countries" *The La'o Hamutuk Bulletin* (2003) <http://www.etan.org/l> (accessed 05.06.2011).

[229] Bakker *Privatisation* 3-4.

[230] PD Lopes *Water Privatisation and The Human Right to Water* (2006) <http://www.ces.uc.pt> (accessed 03.04.2010).

3 4 2 3 Lack of adequate regulation

Water provision normally enjoys monopoly status because of the high costs involved in transporting bulky water products.[231] In other utilities such as telecommunications and electricity, monopoly power is gradually being eroded by technological innovation and the development of competitive substitutes.[232] Such a development is unlikely to occur to any significant extent in the water sector in the foreseeable future hence monopoly in the water services sector is likely to remain a long-term feature.[233] It is significant to point that the difficulties involved in protecting the public from private monopoly power abuses was one of the significant historical factors which led to the development of public water utilities in many countries.[234] This clearly calls for regulation of these private enterprises involved in the provision and management of water services. Opponents of privatisation have also pointed out the often weak regulatory institutions associated with privatisation. This is because private corporations often prefer regulatory discretion to be minimised and for the contract to be the major regulatory mechanism.[235]

Privatisation by States of their traditional domestic functions such as water provision has in some cases weakened regulation at national level, because of investor pressure and new international free trade rules and bilateral investment treaties.[236] This is further compounded by the sheer size and scale of some non-State actors involved in the human rights sensitive services such as the provision of water. Dinah Shelton notes that globalisation has led to the emergence of powerful non-State actors who have resources greater than those of many States.[237] Consequently, most of the private entities have outgrown the ability of individual States to regulate them effectively.[238] The sheer size and influence of some corporations is such that they are capable of determining national policies and priorities.[239] In some cases, weak States, especially in the developing world, are

---

[231] JA Rees "Regulation and Private Participation in the Water and Sanitation Sector" (1998) 22 *Natural Resources Forum* 96.
[232] 96.
[233] 96-97.
[234] 97.
[235] 104
[236] International Council on Human Rights Policy *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002) 10.
[237] D Shelton "Protecting Human Rights in a Globalised World" (2002) 2 *Boston College International and Comparative Law Review* 273 273.
[238] International Council on Human Rights Policy *Beyond Voluntarism* 11.
[239] Shelton 2002 *Boston College International and Comparative Law Review* 273.

unable or unwilling to control their activities. Opponents of water privatisation particularly emphasise that the nature of multinational corporations in today's global economy also makes it more difficult for individual governments, especially those from developing countries, to regulate and hold them to account. For instance, a recent study revealed that in the water sector, the largest MNCs in the water sector are Suez (111,479,116 customers), Veolia Environment (130,924,000 customers), RWE AG (38,235,000 customers), Aguas de Barcelona (29,511,718 customers), Saur (12,999,000 customers), Acea (14,305,000 customers), Biwater PLC/Cascal (8,834,000 customers) and United Utilities (24,028,000 customers).[240]

Those opposed to water privatisation therefore argue that such a development poses challenges to the international human rights movement, because for the most part, that law was designed to restrain abuses by States and State agents. The law has not adequately developed to regulate the conduct of non-State actors.[241] The accountability of non-State actors, including MNCs for the right to water is discussed in detail in chapters 5[242] and 6.[243]

Of particular note is the lack of independence and expertise of regulatory bodies. This was buttressed by Nils Roseman's study of the Manila water privatisation in The Philippines. Roseman's study concluded that it was mainly the erroneous design of the privatisation process and the lack of political will to create a powerful regulatory agency that led to the partial failure of that privatisation scheme.[244] In South Africa, as noted in section 3 5 2 7 below, the local authority in Nelspruit did not have the capacity to effectively regulate the water concession contract hence its failure.[245] McDonald and Ruiters further pointed out that in the Lukhanji, Amahlati and Nkonkobe municipalities in the Eastern Cape Province of South Africa, most of the councillors mandated to monitor and regulate the privatisation contracts lacked the requisite expertise to do so.[246]

---

[240] P Masons *Pinsent Mason Water Yearbook* (2009) 222-223.
[241] Shelton 2002 *Boston College International and Comparative Law Review* 279.
[242] See sections 5 3 3, chapter 5.
[243] See particularly sections 6 2 4 1, chapter 6.
[244] N Roseman *The Human Right to Water Under the Conditions of Trade Liberalisation and Privatisation: A Study on the Privatisation of Water Supply and Wastewater Disposal in Manila* (2003) 6.
[245] McDonald & Ruiters *The Age of Commodity: Water Privatization in Southern Africa* 160.
[246] 160.

3 4 2 4 Ethical, moral and political arguments

Bakker notes that water, essential for life and a non-substitutable good, fulfils multiple functions and is imbued with many meanings.[247] This is because water is a human right, has a religious symbol and a cornerstone of public health.[248] The opponents of water privatisation particularly argue that it is unethical to make a profit supplying people with a resource such as water, a resource essential for life and human dignity.[249] The basis of the argumentation is to emphasise that the main motivation for private actor involvement in the water sector is to make profits.

Some regard water privatisation as capitalism's last frontier.[250] David Harvey, for instance, has argued that water privatisation constitutes what he calls "accumulation by dispossession"- the appropriation, for profit, by the private sector of public goods.[251] Rhodante Ahlers has argued that this "accumulation by dispossession", besides "invoking scenarios of disaster" employs the language of "efficiency and rationality" to sanitise and make the process natural.[252] Ahlers argues that water privatisation policies are not geared towards addressing social or economic inequities with regard to resource management despite the poverty rhetoric. Rather than focusing on incorporating the unserved and underserviced, water privatisation implies that fresh water is individualised and given private property characteristics. Consequently, public goods are being redistributed from public to private property with the help of the market.[253]

3 4 2 5 State efficiency argument

Opponents of water privatisation further argue that State managed water supply utilities can and do just as well as the privately run and managed water systems if properly resourced. They further point out that public entities are more likely to have access to cheaper forms of finance than their private sector counterparts as well as greater democratic control and citizen accountability.[254] This approach questions the efficiency argument deployed by the pro-market water provision protagonists.

---

[247] Bakker *Privatisation* 3.
[248] 3.
[249] 81.
[250] 3.
[251] 137.
[252] See R Ahlers "Fixing and Nixing: The Politics of Water Privatisation" (2010) 42 *Review of Radical Political Economics* 200 225.
[253] 219.
[254] Bakker *Privatisation* 3.

Vickers and Young argue that efficiency as a concept is poorly understood. The empirical evidence on economic efficiency does not conclusively show the superiority of either public or private provision of goods and services.[255] Gayle and Goodrich, for instance, have argued that privatisation in Britain, the former West Germany, Chile and Honduras in the 1980s did not result in any recognisable superior performance by private enterprises.[256] In any case, assessing efficiency based on profitability when public institutions do not solely operate on that basis is unhelpful.[257]

3 4 2 6 Equity arguments

The implementation of cost recovery measures and the removal of subsidies, which go with privatisation, may constitute a denial of access to socio-economic rights, especially those of the poor. Intervention in the form of subsidies and kindred measures by the State is critical in enabling access by the marginalised and poor communities to life sustaining socio-economic and other human rights.[258]

One of the key arguments of the anti-privatisation group is to reject the premise that water services must necessarily be self-financing, thereby requiring full-cost recovery. This is predicated on the reasoning that water supply systems are extremely capital-intensive, hence affordability concerns, particularly for the poor and marginalised, inevitably arise. There is a need for a system of cross-subsidisation which, the group argues, has been embarked on even in developed countries.[259] Reference is made to the historical development of water network systems in developed countries. States were heavily involved in attempting to ensure universal provision through heavily financing water supply systems and the implementation of cross-subsidies.[260]

As a result, the anti-privatisation movement not only rejects the conceptual bases on which water privatisation is predicated, but also vigorously opposes the notion that water should be priced at its full cost, for the reasons discussed above.[261]

---

[255] See J Vickers & M Yarrow *Privatisation: An Economic Analysis* (1988) chapter six.
[256] DJ Gayle & JN Goodrich "Exploring the Implications of Privatisation and Deregulation" in DJ Gayle & JN Goodrich (eds) *Privatisation and Deregulation in Global Perspective* (1990) 8.
[257] S Narsiah "The Neoliberalisation of the Local State in Durban, South Africa" (2010) 42 *Antipode* 374 381.
[258] Chirwa 2004 *African Human Rights Law Journal* 228.
[259] Bakker *Privatisation* 102-103.
[260] 103.
[261] 103.

This group rejects the claim that private management, on a for-profit basis, will improve performance. The group equally rejects the claim that accountability to customers and shareholders is more direct and effective than the attenuated political accountability exercised by citizens via political representatives.[262] The question of accountability, transparency, participation and information accessibility before and during privatisation processes are discussed in section 3 6 below where I carry out a human rights analysis of water privatisation. The following section discusses some of the main arguments that have been put forward to support water privatisation by its proponents.

3 4 3 Arguments in favour of water privatisation

3 4 3 1 State failure

Proponents of private sector participation in the provision of water services advance both fiscal and efficiency arguments to buttress their claims. Those who advocate for water privatisation argue that water is an economic good and a price should be charged for the service of treating and supplying it.[263] The private sector is considered to constitute an obvious alternative for the delivery of water services in the face of State failure to ensure universal access to safe water.[264] This approach posits that the world is facing increasing fresh water scarcity. Privatisation proponents argue that State management and allocation of water services has proven inadequate. They vociferously advocate for introduction of market principles and mechanisms in water management.[265]

The main argument against State provision of water services is predicated on what economists refer to as the concept of State failure. The theory of State failure posits that governments are less productive, efficient, and effective than markets. Bakker notes that in the water sector, the State failure argument comes into play to support claims that the State is a poor manager, that this is evidenced by its failure or inability to supply water to the poor and marginalised as highlighted in chapter 1 above.[266]

---

[262] 138.
[263] WL Megginson *The Financial Economics of Privatisation* (2005) 6 notes that the water industry is one industry where privatisation as well as increasing welfare has been very ambiguous.
[264] Lopes *Water Privatisation* 6.
[265] Ahlers 2010 *Review of Radical Political Economics* 219.
[266] Bakker in particular notes that the State failure critique of public water provision echoed the widespread neo-liberal turn of the 1980s discussed above. The argument was that:

Proponents of water privatisation further argue that water is increasingly a scarce resource which must be priced at full economic cost to facilitate access to water services to communities and individuals who currently lack access and prevent wasteful use.[267] The public sector is deemed to have limited capital to enable universal access. It is often pointed out that the State's investment policies are particularly undermined by short-term political expediency, leading to crass inefficiency.[268] To support their contention they point to the failure by governments to achieve the goal of universal water supply during the International Water and Sanitation Decade (1981-1990). The World Bank has also argued that through increased efficiency, private companies will be able to improve performance and increase cost recovery thereby improving access to water services by a large number of people.[269]

The rationale for shifting water resources management from public to private stewardship is predicated on the argument that the public sector actually hinders the efficient distribution of resources. State management, so the argument goes, results in waste and mismanagement as resources are not allocated according to their highest market value.[270] The pro-privatisation group therefore contends that treating water as a commodity and locating water supply systems in the private sector will translate into less waste, more efficiency and the productive reallocation of the resource. These benefits would flow from the fact that competition for the resource would ultimately determine its corresponding economic value.[271]

3 4 3 2 Accountability and efficiency arguments

The pro-privatisation lobby further argues that public management and provision of water services is immunised from accountability. The thrust of the argument is that public sector managers, particularly in "corrupt" developing countries, are virtually

---

> "Governments, acting, as both owners/operators and regulators, are subject to the poacher-gamekeeper problem; without incentives to penalise themselves, performance would deteriorate. Rent-seeking by officials might lead, for example, to overstaffing or ghost employees or to bribery and corruption among staff. Without appropriate incentives, public water companies would be likely to operate inefficiently. …The implication follows that governments should cede regulatory control to markets, while relinquishing direct management of services and ownership of assets." See Bakker *Privatisation* 43-44.

[267] World Bank: *The State in a Changing World: World Development Report* (1997) 64.
[268] Chirwa 2004 *African Human Rights Law Journal* 224-225.
[269] World Bank *The State in a Changing World: World Development Report* (1997) 64.
[270] Ahlers 2010 *Review of Radical Political Economics* 219.
[271] 219.

unaccountable. As a result, they pursue their own personal goals instead of advancing the public interest.[272]

Susan Spronk notes that public water utilities have, in some cases, been used as political booty by politicians and that justifies the reform of the water sector.[273] According to Spronk, politicians are likely, in the absence of the requisite constraints, to abuse their powers.[274] Public managers are more inclined to "handing out jobs to their allies based upon their political orientation rather than their competence."[275] Spronk argues that this practice will not only distribute resources to political elites, but also represents a significant drain on public finances as it leads to administrations with a bloated, but ill-qualified staff component.[276] Such an assertion is a reflection of neoliberal economic theory which considers any political involvement in the regulation of political outcomes as the pursuit of self-interest by the political elites. This makes it necessary to divorce economic decision-making from political decision-making.[277]

The argument of the pro-privatisation group is to assert that the profit-motive acts as the most effective constraint on individual behaviour. This group asserts that the private sector demands more efficient and professional management than the public sector. The reasoning is that the private sector has to respond to economic considerations instead of political demands.[278] It is argued that the detachment from political control of managers in the private sector means that such managers are better placed to adopt cost effective and efficient means of providing services.[279]

Proponents of privatisation further assert that private companies will perform better in the management and provision of water services. It is presumed that they will be more efficient, provide adequate finance, and attract the requisite technical

[272] Chirwa 2004 *African Human Rights Law Journal* 224-225.
[273] S Spronk "Water and Sanitation Utilities in the Global South: Re-centering the Debate on Efficiency" (2010) 42 *Review of Radical Political Economics* 156 169.
[274] 169.
[275] 169.
[276] Spronk however notes that accountability is a common problem identified by both the public and private sector, but they have divergent views about how to rectify it. Both sides to the contestation agree that improving institutional accountability to encourage rule-bound behaviour is fundamental to enhance performance and raise the quality of public services. The differences of approach relates to who should set these rules and what these rules should look like. See Spronk 2010 *Review of Radical Political Economics* 169.
[277] Spronk 2010 *Review of Radical Political Economics* 169-170.
[278] 169.
[279] Chirwa 2004 *African Human Rights Law Journal* 225.

expertise of higher standards than State-owned entities.[280] These assertions are premised on the argument that State-run water supplies are beset by a plethora of problems. These include lack of adequate investment in the water infrastructure, uneconomically low tariffs, low rates of cost recovery and bloated personnel.[281]

3 4 3 3 An alternative approach: Privatisation not incompatible with the right to water

Another position in the contestation argues for the recognition of water's economic good status as well as recognising its status as a human right. It advocates for the guarantee of universal access to safe water despite the involvement of non-State actors.[282] This group envisages private sector participation with the State having regulatory oversight in order to protect the water's public nature.[283]

This group points out that human rights do not envisage the State as the sole provider of basic services.[284] It is permissible within a human rights framework for private actors to be involved in the provision of human rights sensitive services such as water.[285] Reference is made to the pronouncements by treaty bodies on this issue. In General Comment No 3, the CESCR has asserted that human rights law does not require a particular political or economic system within which human rights

---

[280] Bakker *Privatisation* 2. See also Chirwa 2004 *African Human Rights Law Journal* 225.

[281] Proponents of privatisation have also deployed an environmental argument in favour of privatisation, pointing out that privatisation is conducive to a better and healthier environment. They argue that private sector participation in the delivery of basic services can promote innovation. The discipline of the financial market leads to "interest in new technologies and products that are healthier or environmentally friendlier, in order to secure a competitive advantage over other participants in the industry." See Chirwa 2004 *African Human Rights Law Journal* 225-226. It is argued that such motivation is absent in the case of public enterprises. The proponents further argue that service delivery by the public sector conceals subsidies and other distortions. Subsidisation is regarded as promoting wasteful consumption of environmentally sensitive services such as water. The deployment of privatisation is seen as a means of removing such distortions. It is therefore argued that "the introduction of cost recovery measures provide an incentive to use such services responsibly and in a manner that is not deleterious to the environment." See Chirwa 2004 *African Human Rights Law Journal* 225-226. Chirwa has disputed the assertion that privatisation is beneficial to health and the environment. He points to evidence, such as Shell's operations in Nigeria, demonstrating that the activities of private actors are often harmful to the environment and deleterious to the public health of the inhabitants of the areas in which such entities operate. Chirwa further points to the evidence that such private enterprises have at times "violated environmental and health regulations with impunity through the improper exercise of their economic power, for example, through corruption of the responsible government officials." See Chirwa 2004 *African Human Rights Law Journal* 228.

[282] Lopes *Water Privatisation* 21.

[283] 22.

[284] Chirwa 2004 *African Human Rights Law Journal* 230.

[285] See Liebenberg "Socio-Economic Rights" in M Chaskalson *et al* (eds) Constitutional Law of South Africa (1999) ch 41.

can best be realised.[286] Consequently, it is argued that private sector involvement in the provision of basic goods and services is not in conflict with human rights.[287]

Privatisation of human rights sensitive areas does not absolve the State of its human rights obligations in respect of the privatised services. This implies that, by privatising the provision of basic services and goods, the State remains responsible for ensuring the enjoyment by all people the rights relevant to the privatised service.[288] Agreements with private service providers must therefore be structured by the relevant human rights norms.[289] The State has a duty to regulate and monitor the activities of the private actors during the duration of the privatisation arrangement so that human rights are not imperilled.[290] The State's duty to protect is of utmost significance in the context of privatisation.[291] The CESCR, for instance, has elaborated this obligation to include the duty to prevent rights violations by private actors as well as the duty to control and regulate them. In respect of the right to water, for example, the CESCR has stated that the State has an obligation to prevent third parties from "compromising equal, affordable, and physical access to sufficient, safe and acceptable water."[292]

It appears that both proponents and opponents of water privatisation agree on the importance of monitoring and regulation in the event of privatisation.[293] It is argued that the State's obligation to protect and fulfill the right to water survives the privatisation arrangement. Consequently, a duty is imposed on the State to monitor and regulate the activities of the private enterprises involved in the management and distribution of water services.[294]

---

[286] See Committee on Economic, Social and Cultural Rights General Comment No 3 The Nature of State Parties' Obligations (art 2(1) of the Covenant) (1990) UN Doc E/199/23 para 8.
[287] Chirwa 2004 *African Human Rights Law Journal* 231.
[288] 231.
[289] 233.
[290] Williams 2006-2007 *Michigan Journal of International Law* 501
[291] Chirwa 2004 *African Human Rights Law Journal* 235.
[292] CESCR *General Comment No 15* (2002) para 24.
[293] Williams 2006-2007 *Michigan Journal of International Law* 501. See also General Comment 15 (2002) para 24 which envisages an effective regulatory system to be established, providing for independent monitoring, genuine public participation and imposition of penalties for non compliance with set rules where water services have been privatised.
[294] Williams 2006-2007 *Michigan Journal of International Law* 501-502. See section 4 2 2 2, chapter 4 for further discussion.

3 4 3 4 Efficiency Argument

One of the main criticisms against State-run or private sector managed water facilities is the question of performance. The issue of relative performance of the public and private sectors has been pivotal to the privatisation debate and remains unsettled.[295] The analysis of the requisite comparative performance is often permeated by ideological inclinations.[296] Chirwa has argued that evidence of the positive impact of privatisation on economic growth and efficiency is inadequate and inconclusive.[297]

Khan has carried out a review of the empirical literature on the theoretical underpinnings of the debate on the superiority of the public or private sector provision.[298] This included a review of empirical evidence that included literature on macroeconomic, microeconomic and welfare impacts of privatisation.[299] Khan's finding was that despite a plethora of studies and on-going contestations, the discourse on the superiority or inferiority of public or private provision of goods and services is inconclusive and is likely to remain so in the future. Khan argued that the debate is more ideological than empirical as it is impossible to determine the superiority of one over the other through case studies, which can only be selective in nature.[300]

It is predictable that proponents and opponents of privatisation rarely agree on research strategies, resulting in competing and divergent evaluations of the same contracts.[301] Critiques also point to the self-selecting nature of the privatisation process, with the tendency to privatise the best performing entities.[302] Goals differ under public and private management and distribution of water services. Private service providers, more often than not, are likely to prioritise profitability over and above efficiency and a healthy return on investments. The public sector provider is more likely to focus on universal access, equity and security of supply. Such realities undermine attempts to analyse changes in performance solely on the basis of

[295] Bakker *Privatisation* 100.
[296] 100.
[297] Chirwa 2004 *African Human Rights Law Journal* 226-227.
[298] Khan *Public vs. Private Sector* 1.
[299] 1.
[300] 1.
[301] Bakker *Privatisation* 100.
[302] 101.

efficiency.[303] Bakker also confirms the lack of clarity on the actual effects of public versus private management of water services on specific performance variables, such as efficiency. She however doubts the truism of the assertion that public and private operators are no different from one another.[304]

The following section will discuss four select examples of water privatisation: the Dar es Salaam water privatisation in Tanzania; the Manila water privatisation in The Philippines; water privatisation/corporatisation in select municipalities in South Africa; and the privatisation of the Cochabamba water supply system in Bolivia. The purpose of this discussion will be to attempt to identify broad trends and general impacts of these water privatisation projects in terms of factors such as the access, equity, quality, public consultation and participation, transparency and accountability in water services provision. The above principles embody key elements of a rights based approach to the delivery of water services.[305]

3 5 The impact of privatisation on water services: Select cases

3 5 1 Tanzania: Dar es Salaam water privatisation

3 5 1 1 Background

Water and sanitation services in Tanzania were publicly provided and free of charge for the majority of Tanzanians in keeping with the government's policy of socialism.[306] This policy of provision of free water was in place until 1991. Prior to 1991, the power to regulate and supply water in urban areas was formally granted to the National

[303] 100.

[304] Bakker suggests that one way out of the privatisation impasse may be the adoption of the Dutch model as a compromise of the two antagonistic approaches. The Dutch model combines the best of the public and private sectors where publicly-owned water supply utilities are run on commercial principles, like private corporations. The model is a reflection of the approach which emphasises on the commercialisation of water in order for the resource to be sustainably managed. The Dutch approach involves the adoption "of full cost recovery pricing, the treatment of water as an economic good that must be allocated to its highest value-uses." It is noteworthy that the Dutch approach through its incorporation of market principles for the management and distribution of water services makes it no different from private sector run and managed water utilities. See Bakker *Privatisation* 102.

[305] Chirwa has pointed out that such an approach is based on the premise that the human person is the ultimate subject of human development. See DM Chirwa "Water Privatisation and Socio-Economic Rights in South Africa" (2004) 8 *Law, Democracy and Development* 181 189.

[306] Akech notes that this was in keeping with the country's founding President, Julius Nyerere's vision of creating a society in which "all would be equal in dignity, and would have an equal right to respect, to the opportunity of acquiring a good education and the necessities of life." Akech *Privatisation in East Africa* 62.

Urban Water Authority (hereinafter referred to as "NUWA") which implemented a policy of free provision of water services.[307]

Tanzania's economy began experiencing poor performance in the late 1970s. This was characterised by chronic shortages of essential goods and services and plummeting living standards. Basic infrastructure facilities fell into disrepair due to a lack of maintenance. In Dar es Salaam, Tanzania's largest city, the water and sewerage systems were in a bad state. This was characterised by a high number of damaged pipes, high levels of leakage, illegal connections, low billing, and inefficiencies in the collection of payments.[308] At the time of the water privatisation, according to the World Bank, the water situation in Dar es Salaam was precarious.[309] This state of affairs was attributed to poor management, lack of resources, increased demand and insufficient capital expenditures over a period of decades. This led to a progressive worsening of the situation. The low tariffs historically charged after 1991 had been insufficient to fund capital expenditures. The situation regarding sanitation was even worse.[310] In a long term effort to address the serious public health and economic effects of the poor state of water and sewerage services, Tanzania decided to reform its water and sewerage services sector in Dar es Salaam.

Within this economic environment, the government of Tanzania started a rethink of its policy of free water when it signed a structural adjustment programme with the IMF in 1986, the Economic Recovery Program. This was later modified to create the Economic and Social Action Program in 1989.[311] In 1991, the government adopted the first National Water Policy later to be reviewed in 2002 through the adoption of the new National Water Policy (hereinafter referred to as NAWAPO).[312] Through such reforms the government removed subsidies for its water utilities and

---

[307] 62-63.
[308] 63.
[309] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case no ARB/05/22, award dated 24th July 2008 para 97 (hereinafter "*Biwater v Tanzania"*). The litigation in the Biwater case, which would be fully discussed below, will attempt to identify the impact of water privatisation on factors such as the access, equity, quality, transparency and accountability in water services provision.
[310] Para 96.
[311] D Reed "Case Study for Tanzania" in D Reed (ed) *Structural Adjustment, the Environment and Sustainable Development* (2010) 107 108.
[312] Doering notes that NAWAPO is believed to have introduced decentralisation of water supply management in line with Agenda 21 of the UN Conference on Environment and Development, discussed in chapter 2, section 2 4 7 2 which emphasised the subsidiarity principle whereby water supply management should be located at the lowest appropriate level. See E Doering "The Reform of the Water Sector in Tanzania" (2005) 3 *Summer School: Topics of Integrated Watershed Management – Proceedings* 36-37.

prescribed that such utilities should be self-sustaining. In the city of Dar es Salaam, the government established a public agency, the Dar se Salaam Water and Sewerage Authority (hereinafter referred to as DAWASA).[313] DAWASA merged the water operations of NUWA and the sewerage operations of the former Dar es Salaam Sewerage and Sanitation Department.[314]

3 5 1 2 Dar es Salaam water privatisation

In the framework of broader privatisation efforts, Tanzania obtained funding of US$140m from the World Bank, African Development Bank and European Investment Bank for a comprehensive programme to repair and extend Dar es Salaam's water and sewerage infrastructure. It must be emphasised that the funding was conditional on having a private operator replacing DAWASA.[315] Additionally, the privatisation of DAWASA was one of the conditions imposed for Tanzania to qualify for the Highly Indebted Poor Countries (HIPC) initiative of the World Bank and the IMF.[316]

In preparation for the privatisation of water services, the Tanzanian government enacted legislation in the form of the Energy and Water Utilities Regulatory Authority Act No 11 of 2001 to regulate the energy and water utilities.[317] Two corporations submitted a successful joint bid: Biwater International Limited, a British water multinational and HP Gauff Ingenieure, a German corporation (hereinafter referred to as "Biwater").[318] Biwater incorporated under Tanzanian law a local operating company, City Water, as mandated in terms of the bid. City Water thus entered into a contract with DAWASA in February 2003 to implement the project and was awarded a 10-year lease contract to operate and manage the Dar es

[313] *Biwater v Tanzania* para 99.
[314] Para 99.
[315] See J Perez Sleeping *Lions: International Investment Treaties, State-Investor Disputes and Access to Food, Land and Water* (2011) 19-20.
[316] See K Bayliss "Utility Privatisation in Sub-Saharan Africa: A Case Study of Water" (2003) 41 *Journal of Modern African Studies* 507 522.
[317] *Biwater v Tanzania* para 109.
[318] For a summary of the case see M Polasek *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, Introductory Note to Three Procedural Orders, ICSID Case No ARB/05/22 (2007) 22 *ICSID Review—Foreign Investment Law Journal* 149 149. See also Perez *Sleeping Lions* 19-20; MS Overly "When Private Stakeholders Fail: Adapting Expropriation Challenges in Transnational Tribunals to New Governance Theories" (2010) 71 *Ohio State Law Journal* 341 358-365 for a discussion and analysis of the case.

Salaam and designated coastal regions' water and sewerage system using DAWASA's pipeline network.[319]

In terms of the contract, City Water was responsible for the billing and collection of tariff payments from customers. In addition, the latter assumed certain tariff and rental fee payment obligations to DAWASA in terms of the contract, including extending the water network to the poor, and rehabilitating the water and sewerage system.[320] The evidence produced during the subsequent arbitration hearing[321] shows that since City Water started managing and operating the water system, there was continuous deterioration in the quality of the service. Although both parties experienced serious difficulties in performing their contractual obligations, City Water in particular failed to achieve the level that was anticipated at the time of contracting.[322] City Water experienced severe infrastructure problems and found it extremely difficult to bill and collect from customers for the services it provided. Numerous problems included failure to pay the tariff fees due to DAWASA on a regular basis, failure to provide sufficient investment as agreed in the privatisation agreement, as well as delays in project implementation.[323] Information available to the *amicus curiae*[324] shows that the investment failed mainly due to the company's poor performance, failed business judgment, incompetence and lack of sufficient managerial and financial resources dedicated to the project, rather than by acts or omissions of the Tanzanian Government.[325]

---

[319] *Biwater v Tanzania* para 124.
[320] Paras 123-124.
[321] The case will be discussed in more detail below.
[322] *Biwater v Tanzania* para 149.
[323] Para 486.
[324] The case is fully discussed below. Four non-governmental organisations were involved in the preparation of an *amicus curiae* brief, namely Lawyers Environmental Action Team, a Tanzanian based environmental law organisation, Legal and Human Rights Centre, a Tanzanian-based human rights organisation, the Centre for International Environmental Law, a US-based environmental law organisation and the International Institute for Sustainable Development, a Canadian-based policy research institute.The *amici* were granted the right to file a brief in the *Biwater* case in accordance with the newly amended ICSID Rules. However, the *amici* were unable to obtain access to the documents involved in the arbitration, including the legal arguments of the parties. As a result, the *amici* were compelled to make arguments based on media reports. See Overly 2010 *Ohio State Law Journal* 370.
[325] It appears that Biwater had seriously underestimated the magnitude of the task in that it submitted a poorly structured bid. See *Biwater v Tanzania* para 149. In addition, it appears that City Water was not sufficiently prepared to perform the contract. Because of the poor bid and numerous managerial and implementation difficulties, City Water did not generate the income which had been anticipated at the time of the contract. It is interesting to note that as it was seeking to renegotiate the contract, internal communications at City Water indicate fairly desperate attempts by its management to force the Tanzanian government to renegotiate the contract. For example, an email by a senior manager stated that if City Water did not get the tariff increased, it would "try to force the government's hand" by

One of the reports on Tanzania's privatisation efforts, financed by the World Bank and provided by a former World Bank expert, is quite instructive. It stated that:

> "The primary assumption on the part of almost all involved, certainly from the donor side, was that it would be very hard if not impossible for the private operator to perform worse than DAWASA. But that is what happened."[326]

Attempts by City Water to renegotiate the lease contract failed, resulting in DAWASA terminating the lease contract and taking over the operations of City Water. DAWASA also cited City Water's alleged failure to invest $8.5 million within the first two years of the contract period as one of the reasons for the termination of the agreement. DAWASA's allegation was that City Water had invested only $4.1 million in breach of its contractual undertaking.[327]

Following the termination of the contract, two arbitration proceedings commenced at the instance of Biwater. The first suit was based on the investment contract itself under the UN Commission on International Trade Law (hereinafter referred to as UNCITRAL) rules. The second suit was premised on the UK-Tanzania bilateral investment treaty under the International Centre for the Settlement of Investment Disputes (hereinafter referred to as ICSID) rules alleging expropriation and violation of the principle of fair and equitable treatment. In the first round of proceedings, Biwater filed a compensation claim with UNCITRAL on 16th May, 2005, challenging the legality of the termination of the lease contract. Biwater demanded compensation of between US$20 million and US$24 million for breach of contract.[328] In its 2008 decision, the UNCITRAL tribunal ruled in favour of DAWASA and awarded it US$ 3 million in damages. Citing World Bank evidence, the UNCITRAL tribunal found that the water and sewage services had deteriorated under City Water's management to a greater extent than under the management of the public agency, DAWASA.[329]

---

among other things, stopping payments of DAWASA's fees and retrenching City Water's staff. See *Biwater v Tanzania* paras 149 & 123.

[326] Perez *Sleeping Lions* 19. Nongovernmental organisations working in the water sector were also dissatisfied with the deterioration of services under City Water. Action Aid for instance noted that some customers were being charged for water supplies that they never received. See Akech *Privatisation in East Africa* 69.

[327] *Biwater v Tanzania,* para 165.

[328] Akech *Privatisation in East Africa* 69.

[329] 69.

Biwater instituted a second round of proceedings against Tanzania at ICSID on 5th August 2005. Biwater claimed that the government of Tanzania had breached its obligations under the 1994 bilateral investment treaty between the UK and Tanzania.[330] The suit was based on alleged acts of expropriation and breach of the principle of fair and equitable treatment by Tanzania.[331] The ICSID tribunal declared the Tanzanian government to have breached the expropriation provisions of the UK-Tanzania BIT by expropriating Biwater's investments.[332] It is noteworthy that the tribunal ruled that there was no financial compensation due, as the action of the Tanzanian government did not cause any injury. The ICSID tribunal's opinion was that at the time of expropriation, Biwater's investment was of no economic value and was essentially worthless.[333]

Akech notes that the Dar es Salaam water privatisation was presented as a *fait accompli* as there were neither public consultations nor participation pertaining to possible alternative policy options. The public was kept uninformed during the entire Dar es Salaam privatisation process. The privatisation documents were deemed so confidential that not even members of parliament had access to them.[334] Rather, the privatisation process was conceived, developed and implemented by national and international technocrats without any public consultation.[335] There is no doubt that this lack of transparency and public participation in the privatisation process made it difficult for the public to determine whether the privatisation process was in the public interest.[336]

The Dar es Salaam privatisation thus raises significant accountability issues with regard to the right to water, such as the right to information concerning water issues, the right to public consultation and participation and the right to effective

[330] *Biwater v Tanzania* para 17.
[331] Article 5 of the BIT between the UK and Tanzania states that investments shall not be "nationalised, expropriated or subjected to measures having an effect equivalent to nationalisation or expropriation…in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation." See *Biwater v Tanzania* para 394. City Water's case was founded on a series of acts of the Tanzanian government following the decision to terminate the contract, including the minister's public pronouncement of the termination, deportation of City Water's senior managers, DAWASA's seizure of assets belonging to City Water and the taking over of City Water's business by DAWASA. See *Biwater v Tanzania* para 469.
[332] *Biwater v Tanzania* para 485.
[333] Para 792.
[334] Action Aid *Turning off the Taps: Donor Conditionality and Water Privatisation in Dar se Salaam* (2004) 10.
[335] Akech *Privatisation in East Africa* 65.
[336] 66.

remedies.[337] I elaborate on these shortcomings further in section 3 5 below where I evaluate the human rights implications of the various water privatisation case studies to be discussed. These issues will be explored in further detail in chapter 6 where I develop an accountability model to guide States and non-State actors in the event of privatisation of water services and how such a model can be adapted to be responsive to different institutional arrangements in the provision of water services.

A particularly significant issue which also arose during the arbitration is the question of human rights in the context of privatisation. The Dar es Salaam water privatisation specifically raises fundamental issues such as how the rights of ordinary people, who are the supposed beneficiaries of the privatisation processes, are to be protected in such disputes. The question of the impact of bilateral investment treaties on governmental autonomy to regulate privatisation processes to ensure the enjoyment of human rights such as the right to water is a significant issue.[338] Noteworthy is the question of how such human rights imperatives, in particular the right to water, are to be treated in investment arbitration. A comprehensive analysis of the human rights implications of bilateral investment treaties is beyond the scope of this chapter, but reference will be made to the issue where it pertains specifically to the impact of privatisation initiatives on the right to water.

This question of the impact of investment treaties and the right to water is usefully examined in the context of the *amicus curiae* brief submitted to the ICSID tribunal by a number of non-governmental organisations, following the tribunal's ruling that it would accept such a brief.[339] The *amicus curiae* argued that when the private sector investors failed to fulfill their contractual obligations, it was not simply the commercial bargain that was affected. The realisation of the right to water was imperilled.[340] The *amicus curiae* further pointed out that engaging in human rights-sensitive activities such as the management and distribution of water services should be understood to increase the standards of responsibilities of such private entities. It follows that when private actors choose to be involved in the distribution and

[337] See CESCR *General Comment No15* (2002) para 12.
[338] See LE Peterson & KR Gray *International Human Rights in Bilateral Investment Treaties and In Investment Treaty Arbitration* (2003) Research Paper prepared by the International Institute for Sustainable Development (IISD) for the Swiss Department of Foreign Affairs 5 <http://www.iisd.org> (accessed 05.06.2011).
[339] See Overly 2010 *Ohio State Law Journal* 370.
[340] *Lawyers Environmental Action Team, Legal and Human Rights Centre, Centre for International Environmental Law and the Institute for Sustainable Development*, Amicus Curiae Submission, March 26, 2007, in the matter of *Biwater v Tanzania, Case no* ARB/05/22 (hereinafter *Biwater Amicus Brief*) 15.

management of water services, they assume responsibilities that are linked to the achievement of fundamental human rights.[341]

The finding of the arbitral tribunal that Tanzania had violated the expropriation clause in the BIT has been rejected by Akech.[342] Akech argues that the actions of the Tanzanian government were predicated on, and constituted a legitimate attempt to regulate a privatisation process to safeguard human rights, in particular the right to water.[343] Akech's argument is particularly important given that the privatisation of essential services such as water carry with it grave public health risks to the population at large. This is captured by the *amicus curiae*'s persuasive argument in which it intimated that MNCs engaged in the provision of human rights-related services have a responsibility to meet their obligations as foreign investors before seeking the protection of international law.[344]

The *Biwater* case illustrates the imperative need to impose responsibilities on private entities in order to secure the protection and realisation of basic services such as water. This is particularly relevant in the case of MNCs such as *Biwater*. BITs invariably grant foreign investors substantive rights without imposing corresponding obligations.[345] The question of human rights responsibilities of non-State actors involved in the provision of water services is fully explored in chapter 5.

General Comment 15[346] requires States to prepare a plan for implementing the right to sufficient water at the national level. The strategy may involve the engagement of private actors through water privatisation processes to assist in the realisation of the right to water. It must be noted that the formulation and implementation of such national strategies requires compliance with both substantive and procedural safeguards regarding the right to water discussed in chapter 2.[347]

The *Biwater* case highlights the importance of monitoring and regulatory mechanisms in to put a spotlight on the activities of water services providers. The Dar es Salaam privatisation contract was entered into in the absence of an independent regulatory body to monitor the privatisation agreement. Water Aid has pointed out that the contract was a large and complex document reflecting the desire

[341] *Biwater Amicus Brief* 5.
[342] Akech *Privatisation in East Africa* 75.
[343] 75.
[344] *Biwater v Tanzania* para 380.
[345] Akech *Privatisation in East Africa* 75.
[346] CESCR *General Comment No 15* (2002) para 37(f).
[347] See R Pejan "The Right to Water: The Road to Justiciability" (2004) 36 *George Washington International Law Review* 1181 1189.

of the World Bank and other interests to curtail the problems that might arise in the absence of an independent regulatory body.[348]

It is of the utmost significance to establish an independent regulatory and monitoring body in any privatisation initiative, particularly where the privatisation relates to a public good such as water. In such a situation, the role of an independent regulator is to separate policy-making from service provision in a way that preserves the regulator's independence.[349] The Dar es Salaam privatisation study demonstrates that the regulatory function was not clearly divorced from policy-making.[350] The utilities regulatory body, the Energy and Water Regulatory Utilities Regulatory Authority, did not exist in an operational sense during the City Water operating period.[351] This resulted in the responsibility for the monitoring and regulation of the privatisation arrangement defaulting to DAWASA and the Ministry of Water and Livestock Development.[352] This clearly resulted in an untenable situation of vesting responsibility for regulation and performance monitoring in an organisation responsible for service delivery and investment financing thereby creating a potential conflict of interest.[353] The absence of a regulatory and monitoring body meant there was no independent authority to establish tariff levels.[354]

3 5 2 South Africa: Water privatisation and corporatisation

3 5 2 1 Background

Privatisation in South Africa is not a post-apartheid phenomenon.[355] Although the privatisation debate has received heightened attention in the post-apartheid era, the apartheid government in South Africa had already started experiencing pressure from the business community to privatise State enterprises.[356] Narsiah has argued that the National Party government subscribed to the neoliberal discourse that was being deployed by the institutional apparatus of the "global north" during the period leading

[348] Water Aid *Why did City Water Fail?: The Rise and Fall of Private Sector Participation in Dar es Salaam's Water Supply* (2008) 12 <http://www.wateraid.org/documents/plugin_doc.pdf> (accessed 02.09.2011).
[349] 15.
[350] 15.
[351] 12.
[352] 12.
[353] 13.
[354]15.
[355] Narsiah 2008 *Development Southern Africa* 26.
[356] Chirwa *Law, Democracy and Development* 181.

up to the demise of apartheid.[357] In Narsiah's view, the apartheid regime in South Africa was simply copying global trends.[358] This of course is not to underestimate the internal business lobby that was also vigorously pushing for privatisation of State-owned corporations.[359] Chirwa also points to the influence of IFIs, noting that pressure to privatise mounted towards the end of the apartheid regime. The World Bank and IMF intensified their negotiations with the South African government, resulting in the adoption of the Normative Economic Model in March 1993.[360] This policy framework emphasised privatisation, liberalisation, expenditure cuts and strict fiscal discipline as its key tenets.[361]

The African National Congress (hereinafter referred to as "the ANC") and its alliance partners adopted, in early 1994 as their election manifesto, "a vaguely Keynesian State interventionist strategy" christened the Reconstruction and Development Plan (hereinafter referred to as "the RDP").[362] Dugard points out that the RDP made explicit recognition of water "as a public good whose commodification would inherently discriminate against the majority poor."[363] The RDP, for instance, undertook to enable free access to 20–30 litres of water per person per day within 200 meters of a dwelling in the short term.[364] It further provided for an amount of 50–70 litres in the medium term and universal supply in the long term.[365] By 1996 the new ANC-led government had decided on a market-led approach to development through its macro-economic blue-print, the Growth, Employment, and Redistribution

[357] Narsiah 2008 *Development Southern Africa* 24.
[358] This may not be surprising given that the Apartheid State maintained close ties with purveyors of privatisation such as the UK and the US as well as the global financial institutions. See Narsiah 2008 *Development Southern Africa* 24.
[359] It has also been suggested that privatisation was used as an exit strategy by the erstwhile National Party government. See Narsiah 2008 *Development Southern Africa* 24.
[360] Chirwa 2004 *Law, Democracy and Development* 182.
[361] 182.
[362] Narsiah 2010 *Antipode* 386.
[363] See J Dugard "Can Human Rights Transcend the Commercialisation of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy" (2010) 42 *Review of Radical Political Economics* 175 181.
[364] The RDP stipulated as a medium term goal the provision of:

> "50 - 60 lcd [litres per capita (person) per day] of clean water, improved on-site sanitation, and an appropriate household refuse collection system. Water supply to nearly 100 per cent of rural households should be achieved over the medium term, and adequate sanitation facilities should be provided to at least 75 per cent of rural households. Community/household preferences and environmental sustainability will be taken into account." See K Tissington, M Dettmann, M Langford, J Dugard & S Conteh *An Assessment of South Africa's Water and Sanitation Provision in 15 Municipalities* (2008) 19.

[365] Narsiah 2010 *Antipode* 386.

program (hereinafter referred to as "GEAR").[366] Narsiah notes that the GEAR programme was premised on a market-oriented growth strategy. It promoted "increased private sector involvement through the preferred options of 'ring-fencing,' corporatisation and outright privatisation."[367] Additionally, GEAR emphasised on enunciated fiscal and monetary restraint, trade liberalisation and export orientation. This was a prelude to massive cutbacks in social spending.[368]

3 5 2 2 Legislative framework for privatisation

On the legislative front pieces of legislation and a host of policy papers relating to PPPs created the space for the private sector to play an increasingly significant role in the provision of public services.[369] The Municipal Systems Act 32 of 2000 (hereinafter referred to as the "Systems Act"), made provision for the entry of the private sector and private sector governance principles into the public services. Section 76 of the Systems Act provides for the provision of municipal services by:

> "Any business unit devised by the municipality provided it operates within the municipality's administration and under the control of the council in accordance with operational and performance criteria determined by the council … [as well as] any other institution, entity or person legally competent to operate a business activity."[370]

---

[366] S Narsiah "Urban Pulse - The Struggle for Water, Life and Dignity in South Africa: The Case of Johannesburg" (2011) 32 *Urban Geography* 149 149. This was a somewhat extraordinary somersault as the African National Congress (hereinafter "ANC")s' stance on privatisation before 1992 was negative and suggestive of an inclination to nationalisation of key industries. It was only in 1994 that certain features of neoliberal economy policy began to manifest themselves, particularly in relation to the endorsement of a restricted role for the State in the redistribution of public goods. See Chirwa 2004 *Law, Democracy and Development* 182.

[367] Narsiah 2008 *Development Southern Africa* 26.

[368] Narsiah 2010) *Antipode* 386. Dugard notes that since the finalisation of the demarcation process of local government in 2000, the poor and marginalised communities have frequently been at the receiving end of increasing water supply disconnections as a result of the adoption of commercial and market principles in water distribution by municipalities. Dugard further notes that before the prescripts in the RDP blueprint could hold, the Department of Water Affairs (hereinafter referred to as DWAF), as early as 1994, adopted a Water Supply and Sanitation White Paper. The Water Supply and Sanitation White Paper provided, among other things, that "where poor communities are not able to afford basic services, government may subsidise the cost of construction of basic minimum services but not the operating, maintenance or replacement costs." The 1997 White Paper on a National Water Policy for South Africa replicated the same approach in the following terms: "To promote the efficient use of water, the policy will be to charge users for the full financial costs of providing access to water, including infrastructure, development and catchment management activities." Dugard also points out that this paradigm shift signalled a back-pedalling and rolling back of the RDP position on water immediately after the ANC took office. See Dugard 2010 *Review of Radical Political Economics* 181.

[369] These include the Water Services Act No 108 of 1997 (hereinafter "Water Sevices Act"), the Local Government: Municipal Systems Act No 32 of 2000 (hereinafter "Systems Act") and the Municipal Structures Act No 117 of 1998 amongst others.

[370] See section 76(b)(v) of the Systems Act.

Chirwa particularly notes the importance of the Systems Act in creating the necessary framework for the participation of private entities in the provision and management of water services in South Africa.[371] There was no prescribed procedure in South Africa for engaging private actors in the provision of municipal services such as water.[372] Consequently, earlier privatisation ventures raised questions as they were transacted with no participation nor information provided to affected communities.

The Systems Act makes provision for the engagement of a private actor in the provision of basic municipal services and the procedures that must be followed. The Systems Act provides that a municipality has discretion to provide a municipal service through an internal or external mechanism.[373] The external mechanism may be a community-based organisation, a non-governmental organisation or a private service provider. The Systems Act defines a "basic municipal service" to mean a service necessary to ensure "an acceptable and reasonable quality of life which if not provided, would endanger public health or safety or the environment."[374] Water services invariably qualify as a municipal service. The Water Services Act 108 of 1997 (hereinafter referred to as the "Water Services Act") also gives allowance for private corporations to provide water services in South Africa. The Water Services Act provides that a water services authority may itself provide water services or enter into a written contract with a water services provider or form a joint venture with another water services institution to provide water services.[375] The Water Services Act provides, however, that a water services authority may only enter into a contract with a private sector water services provider after it has considered all known public sector water services providers that are willing and able to perform the relevant functions.[376]

3 5 2 3 Cutting of transfers to municipalities

Funding for social services from central government to municipalities was being increasingly cut back in line with the fiscal restraint approach adopted by the national

[371] Chirwa 2004 *Law, Democracy and Development* 181 191.
[372] 191.
[373] See section 76 (a) of the Systems Act.
[374] See section 1.
[375] Section 19 (1) Water Services Act.
[376] Section 19(2).

government.[377] McKinley points out that as part of the GEAR framework and following the economic advice of the World Bank and the IMF, the South African government drastically decreased grants and subsidies to local municipalities as well as support for private provision of basic services.[378]

Municipalities came under considerable pressure from the national treasury to recover costs for the provision of services such as water from all areas, including poor communities.[379] This approach is reflected in a report on the survey of water services across 15 municipalities conducted by the Centre for Applied Legal Studies, the Centre on Housing Rights and Evictions and the Norwegian Centre for Human Rights, between November 2007 and July 2008.[380] The report points to a generalised adherence by municipalities to a cost recovery approach in which water is viewed primarily as a commercial good and in most instances is one of the main sources of revenue for cash-strapped municipalities.[381]

Jackie Dugard has argued that the gradual erosion of the progressive commitments of 1994 has been the domestic political reality of decentralised and under-funded local government in South Africa.[382] Dugard further notes that within the overall structural arrangement, local government is an autonomous sphere of government in terms of which, each municipality has the right to govern, on its own initiative, the local government affairs of a particular community.[383] Dugard makes reference to the entrenching of local government autonomy and responsibility for water services which has resulted in national government withdrawing required financial support for the provision of basic social services such as water.[384] A 1998 study carried out by the Finance and Fiscal Commission indicated that intergovernmental transfers to municipalities were cut by 85 per cent between 1991 and 1997.[385] This was particularly a drastic measure, given that the study also revealed that municipalities relied on central government for up to 95 per cent of their funding. This created the impetus for municipalities to adopt stringent fiscal and credit

[377] Narsiah 2010 *Antipode* 403.
[378] D McKinley "The Struggle Against Water Privatisation in South Africa" in D McKinley (ed) *Reclaiming Public Water: Achievements, Struggles and Visions from Around the World* (2005) 181 182.
[379] K Tissington et al *An Assessment of South Africa's Water and Sanitation Provision* 8.
[380] 8.
[381] 8-9.
[382] See Dugard 2010 *Review of Radical Political Economics* 182.
[383] 183.
[384] 182.
[385] Narsiah 2008 *Development Southern Africa* 27.

control measures to ensure solvency, thereby paving the way for privatisation, particularly in the provision of basic services such as water.[386]

3 5 2 4 Forms of privatisation in South Africa

Privatisation of water services, as indicated above, is operationalised in two ways. This can take the form of outright divestiture implemented in England and Wales as discussed above. It can also take the form of various mixes of PPPs. As highlighted above, corporatisation is a more tacit form of privatisation.[387] Bakker has referred the latter as institutional change where "markets, efficiency measures, principles of competition, and economic equity guide management practice." [388]

South African municipalities are of late resorting to corporatisation as a model of water provision. This is done as an alternative, and in some cases simultaneously with PPPs.[389] The complete divestiture of water services is not possible under the current legal framework in South Africa. The Municipal Finance Management Act 56 of 2003 prohibits the disposal of a capital asset of a municipality needed to provide the minimum level of a basic municipal service.[390] Full divestiture is therefore not an option in the South African context for the purposes of private sector involvement in the provision of water services.[391] Private sector involvement in water services provision and management in South Africa is not privatisation in the sense of a change in ownership. Rather, it is a form of water governance whereby market principles such as commodification and full cost pricing and water metering

[386] 27. Dugard points out for instance that the 1998 White Paper on Local Government attempted to elaborate on the constitutional provisions for municipal finance provided for under sections 229 and 230 of the South African Constitution, 1996. These provisions are aimed at enjoining municipalities to balance their budgets "regardless of how poor or pressing the socio-economic needs of residents." Additionally, section 18(1)(c) of the Local Government: Municipal Finance Management 56 of 2003 "precludes municipalities from borrowing to fund operational budgets (in other words, municipalities cannot incur deficits on their operational budgets.)" According to Dugard, the combined effect of reducing central financial support and prohibiting operational budget deficits has pushed many municipalities (with Johannesburg at the forefront) to turn towards commercialisation of basic services such as water as a means of generating the requisite revenue no longer provided by the national State in order to keep the systems running and viable. See Dugard 2010 *Review of Radical Political Economics* 183.

[387] Chirwa 2004 *Law, Democracy and Development* 185.

[388] Bakker 2002 *Environment and Planning* 769.

[389] Chirwa 2004 *Law, Democracy and Development* 185.

[390] Section 90(1) of the Municipal Finance Management Act 56 of 1993 provides that "[a] municipal entity may not transfer ownership as a result of a sale or other transaction or otherwise dispose of a capital asset needed to provide the minimum level of basic municipal services."

[391] See K Jeenes & L Steele *The Eastern Cape Basic Services Delivery and Socio-Economic Trends Series: Providing Water and Sanitation* (2010) <http://www.fhiser.org.za/files/publications> (accessed 15.06.2011).

technologies that mimic the private sector are implemented.[392] Narsiah has noted that the prevalence of prepaid technology such as prepaid water metres suggests that the poor are now paying more than the rich for services. This is because they have to pay for the installation and maintenance of the prepaid metering technology in addition to paying for their water usage.[393]

In South Africa, water privatisation has thus been mainly operationalised through PPPs whereby the State retains some degree of control over the service.[394] Local authorities often lease out certain activities to private enterprises. This involves outsourcing or contracting out specific activities to private actors such as water system management and supply, meter reading, pipe laying, water testing and water cut-offs. [395]

Corporatisation of water services is another prominent feature of water provision techniques in South Africa. As a way of avoiding the outright involvement of private entities, with the attendant controversy this attracts, some municipalities in South Africa such as Johannesburg and Durban, have resorted to corporatisation as a model of water provision as an alternative to, or simultaneously with, PPPs.[396] Corporatising a public service, as indicated above,[397] entails the service embracing market principles which may not necessarily involve a private entity. These include full-cost recovery, treatment of water as an economic good and the mutation of citizens to customers of the entity. Often, corporatisation is the stepping stone towards involvement of private entities in the provision of water services.[398]

3 5 2 5 Select municipalities

3 5 2 5 1 Lukhanji, Amahlati and Nkonkobe

Three towns in the Eastern Cape Province of South Africa, Lukhanji, Amahlati and Nkonkobe (formerly Queenstown, Stutterheim and Fort Beaufort respectively) were the first municipalities to experiment with water privatisation in South Africa.[399] The Lukhanji water and sanitation system was the first to be privatised in 1992. The then

[392] Narsiah 2008 *Development Southern Africa* 22.
[393] 22.
[394] Chirwa 2004 *Law, Democracy and Development* 184.
[395] 184.
[396] 184.
[397] See section 2 1 above.
[398] 184-185.
[399] Narsiah 2008 *Development Southern Africa* 25.

Queenstown Council entered into a 25-year contract with Water and Sanitation Services South Africa (formerly Aqua-Gold and a subsidiary of the French multinational Leonnaise des Eaux) (hereinafter referred to as "WSSA").[400] The privatisation contract, presumably for profit reasons, only covered White and Coloured (mixed race) areas. African townships were excluded from the contract.[401] The Amahlati and Nkonkobe municipalities also followed with water privatisation in 1993 and 1994 respectively. In all the cases, WSSA won the management contracts in question.[402]

It is noteworthy that in both the Lukhanji and Amahlati water privatisation contracts with WSSA, the latter's responsibilities are described as:

> " [The] management, operation and maintenance of the system; rehabilitation of the existing system; keeping and updating all records required for the proper management of the system; and other responsibilities as may be agreed upon by the parties."[403]

In the case of Nkonkobe, the water privatisation contract with WSSA was nullified by the then Grahamstown High Court. The Nkonkobe municipality won a court battle to nullify a six year-old water privatisation contract.[404] The municipality

---

[400] Mbazira notes that:

> "The motivations for going the privatisation-outsourcing route were both broadly ideological and explicitly political. It was also driven by a belief that the private sector would be capable of delivering an effective service … [L]ocal government actors at the time were aware of the pending hand-over of 'their' towns, processes and assets to unknown and still feared new political actors. For that generation, privatisation and outsourcing -- informed by the infamous Thatcherism -- thus gave managerial custodianship of some of their towns' assets to a private company. Besides water, the old Queenstown council shed the mid-town market, abattoir, swimming pool, sport clubs and some heavy-duty equipment…there were strong economic imperatives involved in outsourcing aspects of service delivery and shedding the old market building that was running at a huge loss. Water was the only essential basic service that was put up for 'delegated management."

See C Mbazira *Privatisation and the Right of Access to Sufficient Water in South Africa: The Case of Luhkanji and Amahlati* (2005) 25.

[401] G Ruiters "The Political Economy of Public-Private Contracts: Urban Water in two Eastern Cape Towns" in DA McDonald & G Ruiters (ed) *The Age of Commodity: Water Privatisation in Southern Africa* (2005) 148 145.

[402] Chirwa (2004) *Law, Democracy and Development* 182. The Lukhanji contract was signed on the 18 June 1992, to run for a period of 25 years. The Amahlati contract on the other hand was signed on 28 September 1993, to run for a period of ten years. After 1994 the Lukhanji contract was, by variation and adjustment of the payment formula, extended to cover Ezibeleni and Mlungisi having previously served only the white dominated urban area of Queenstown. See Mbazira *Privatisation and the Right of Access to Sufficient Water* 26-27.

[402] Provided under clause 3 of the contract. See Mbazira *Privatisation and the Right of Access to Sufficient Water* 5.

[403] 5.

[404] *Nkonkobe Municipality v Water Services SA (Pty) Ltd* 2001 ZAECHC 3.

brought the application after high management fees of R400 000 per month placed an intolerably high burden on its budget. The exorbitant fees charged by the private water services provider left the municipality reeling with no money to provide for other basic services. The municipality argued before the High Court that it would save R19 million if the contract could be nullified. The High Court eventually nullified the contract on the basis that the municipality did not comply with the necessary consultation and public participation requirements. Such irregularities came to light following protest and campaigning from civil society. The Court ruled that the contract was invalid as it had not been published first for comment by members of the public. Furthermore, the approval of the local government Member of the Executive Council was never obtained as statutorily required.[405] This case is fully discussed in chapter 6 in the context of analysing the significance of public participation and consultation of affected communities during the water privatisation process.[406]

According to Greg Ruiters' research, water tariffs increased up to three-hundred percent between 1994 and 1999 in Lukhanji, Nkonkobe and Amahlati. These increases were particularly felt by residents of Ezibeleni and Mlungisi, the two African townships that were placed under the jurisdiction of Lukhanji with the result that the WSSA contracts were extended to them.[407] It has been further noted that by 1996, the average township household income was less than sixty dollars per month and more than half of township residents were unemployed.[408] In Lukhanji, for instance, debt collectors and private security firms were delegated to recover overdue payments and perform water cut-offs of non-paying residents. The municipalities did not realise any profits because the revenue gained was needed to pay off WSSA charges.[409]

3 5 2 5 2 Ilembe (formerly Dolphin Coast)

Ilembe (formerly Dolphin Coast) in KwaZulu Natal province entered into a privatisation contract by agreeing to a 30 year concession contract with Saur International of France through its local subsidiary, Siza Water Company (hereinafter referred to as “Siza Water”) in 1999. The contract was seen as a pioneering example

[405] 15-18.
[406] See section 6 3 2, chapter 6.
[407] Ruiters "The Political Economy of Public-Private Contracts” in *The Age of Commodity* 149.
[408] 149.
[409] See International Consortium of Investigative Journalists *The Water Barons: How a Few Powerful Companies Are Privatising Your Water* (2003) 3.

of privatisation, justified by the government on the basis of lack of municipal capacity and inability to raise funding.[410]

Under the concession contract, Siza Water assumed responsibility for providing water and sanitation services to what was then known as the Borough of Dolphin Coast, a locality in the iLembe District Municipality. In 2001, the private operator experienced financial problems. This resulted in Siza Water refusing to pay the scheduled R3.6m lease payment due. Siza Water successfully demanded a re-negotiation of the contract in its favour and asked for relief under the contract, which provided for re-negotiation if returns were either above or below a predetermined range.[411] The local authority approved a revised contract in May 2001, under which water prices were immediately increased by 15% to restore profitability and the water company's investment commitment was reduced from R25m to R10m over five years.[412]

3 5 2 5 3 Mbombela (formerly Nelspruit)

Mbombela (formerly Nelspuit) in the Mpumalanga province of South Africa also entered into a privatisation agreement in 1999, signing a 30-year concession contract with Biwater's local subsidiary, Greater Nelspruit Utility Company (hereinafter referred to as "GNUC"). GNUC subsequently changed its name to Silulumanzi and subsequently sold to Sembcorp of Singapore in 2010.[413] Despite the privatisation, Biwater had great difficulty in raising the money and has depended on finance from the public sector. Consequently, Biwater was on the verge of withdrawing because of high levels of dissatisfaction by water users. In July 2000, nearly two-thirds of the total finance for the project was finally obtained in the form of a loan from the State-owned Development Bank of South Africa.[414] This shows that the so-called investor was not in fact injecting finances into the water sector, but instead relying on borrowing from local financial institutions.

[410] D Hall & E Lobina "Profitability and The Poor: Corporate Strategies, Innovation and Sustainability" (2007) 38 *Geoforum* 772–785.
[411] Hall & Lobina 2007 *Geoforum* 778.
[412] 778.
[413] Narsiah 2008 *Development Southern Africa* 27.
[414] See Public Citizen *Water Privatization Fiascos* 7.

3 5 2 5 4 Johannesburg

The corporatisation of the Greater Johannesburg water supply services by the City of Johannesburg was a response to the financial crisis engendered by funding cuts from central government. This was also evidenced by the grant of a five-year management contract to a private multinational entity as part of Johannesburg turnaround plan called *Igoli*.[415] In January 2001, the City of Johannesburg established a municipal company, Johannesburg Water Pty Ltd (hereinafter referred to as "Johannesburg Water") and subsequently signed a management contract with WSSA,[416] a joint venture between Suez (ex-Lyonnaise des Eaux), its subsidiary, Northumbrian Water Group, and the South African company, Group 5. The contract was not extended when it expired in 2006.[417] Johannesburg Water is a ring-fenced corporation with a corporate model approach to managing water services. This means that water services are run along largely commercial lines with the exception of the obligatory concessions to social equity such as the free basic water provision. This has resulted in the treatment of water as more of an economic good and less of a public and health-related good.[418]

Shortly thereafter, in 2003 the City of Johannesburg adopted a new tariff structure. The new tariff structure resembled a "steep-rising concave tariff curve for water, in contrast to a convex curve starting with a larger free basic water lifeline tariff block."[419] Dugard argues that the latter tariff structure would have appropriately served the interests of poor and marginalised residents in enabling them to access water at a lower cost.[420] Dugard further notes that from 2004, Johannesburg Water started implementing its cost recovery measures by installing prepayment water metres.[421]

The automatic disconnection feature of prepayment water meters is absent from conventional water meters. Conventional water metres supply water on credit, and provide important procedural protections prior to any disconnection of the water supply.[422] Such procedural safeguards include the purchase of water on credit with

[415] See Dugard 2010 *Review of Radical Political Economics* 183.
[416] Chirwa 2004 *Law, Democracy and Development* 183.
[417] Narsiah 2008 *Development Southern Africa* 27.
[418] Dugard 2010 *Review of Radical Political Economics* 181.
[419] 181.
[420] 181.
[421] 176.
[422] 176.

reasonable notice in case of payment arrears, and possible disconnections from the water service. Section 4(3)(c) of the Water Services Act states that procedures for the discontinuation of water services must not result in a person being denied access to basic water services for non-payment, where that person proves that he or she is unable to pay for such basic services. Section 4(3) of the Water Services Act further provides that procedures for the limitation or discontinuation of water must be fair and equitable and should provide for reasonable notice of intention to terminate water services, and most significantly, for an opportunity to make representations.[423]

3 5 2 6 Water disconnections in South Africa

The implementation of privatisation and other commercialisation policies relating to water in South Africa has paved the way for tariff increases in the provision of water services. This has resulted in an increasing number of disconnections of poor communities from accessing basic services such as water.[424] For example, one study found that about 800-1000 disconnections per day were taking place in Durban in early 2003, affecting an estimated 25 000 people a week.[425] Another study has revealed that, in 1999-2001, 159 886 households in Cape Town and Tygerberg experienced water cut-offs as a result of the failure to pay for water services.[426]

The application of market principles in the KwaZulu-Natal province resulted, in August 2000, in a rash of disconnections of thousands of people from their previously free water supply. This was a consequence of the changing of the free communal tap system to a prepaid metering system. A cholera outbreak ensued, affecting 275,000 households. The result was that 120,000 people were infected with cholera and more than 300 people died.[427] This is an illustration that water commodification and cost recovery can have devastating implications for the health of people when not properly implemented.

Dugard has highlighted the absence of a national water regulator in South Africa which she attributes to the *laissez-faire* approach by government to regulating water services in the public interest.[428] The significance of a national regulator cannot be overemphasised. Such an entity is particularly relevant in ensuring that there is

[423] See section 4(3)(b) of the Water Services Act.
[424] Chirwa *Law, Democracy and Development* 197.
[425] 197.
[426] 197.
[427] McKinley "The Struggle Against Water Privatisation" in *Reclaiming Public Water* 184.
[428] Dugard 2010 *Review of Radical Political Economics* 181.

municipal compliance with national legislation, policies, and standards.[429] Without a national regulatory body, the privatisation and corporatisation of water will focus on the economic good status of water, reduction of cross-subsidisation and disregarding human rights such as the right to water and social equity in the management and distribution of water services.[430]

3 5 2 7 Regulatory and monitoring challenges

The experience of the water privatisation initiatives in South Africa has also highlighted the problem of accountability for private actors involved in the provision of water services. The local authority in Nelspruit, for instance, did not have the capacity to effectively monitor the water concession hence its dismal failure.[431] The Compliance Monitoring Unit set up by the City Council to monitor the performance of the private service provider has not been successful and was reported to have been dysfunctional.[432] This has been replicated elsewhere. In the Eastern Cape where other municipalities have privatised water as discussed above, Greg Ruiters pointed out that most councillors mandated to monitor and regulate the privatisation contracts lack the requisite expertise to do so.[433] Ruiters further notes that only a negligible number of councillors have either seen or understood the contracts they are supposed to regulate and monitor.[434]

3 5 3 The Philippines: Manila water privatisation

3 5 3 1 The context of privatisation in The Philippines

The World Bank played a pivotal role in the privatisation of water and sanitation services in The Philippines capital, Manila.[435] As The Philippines transitioned from the dictatorial rule of Ferdinand Marcos to the democratic administration of Corazon Aquino, international financial institutions led by the World Bank put pressure on the new government to privatise State-owned industries and utilities. In fact the

[429] 181.
[430] This issue will be discussed further in chapter 6 where I develop an accountability model to guide States and non-State actors in the event of privatisation of water services.
[431] McDonald & Ruiters "Theorising Water Privatisation in Southern Africa" in *The Age of Commodity: Water Privatisation* in *Southern Africa* 160.
[432] Chirwa *Law, Democracy and Development* 197.
[433] McDonald & Ruiters "Theorising Water Privatisation in Southern Africa" in *The Age of Commodity: Water Privatisation* in *Southern Africa* 159-160.
[434] 160.
[435] Roseman *The Human Right to Water* 6.

International Finance Corporation of the World Bank Group was the advisor to The Philippines government on the privatisation process. One of the major arguments advanced to support privatisation was the efficiency factor discussed above.[436] As will be recalled, the argument is that State-owned utilities are inefficient and private entities are better suited to managing utilities because they create incentives for expanded service and efficient use of resources.[437]

In The Philippines, utility services such as water are ordinarily provided by local water boards or water districts. These are public administrative entities overseen by their respective local governments. Manila was chosen for privatisation because of the sheer number of residents (18 million) and the scale of the service problems the public provider was having. These were deemed to require internationally experienced water companies.[438] Christian Wolf points out that before privatisation, the then Manila water provider, the Metropolitan Waterworks and Sewerage System (hereinafter referred to as "MWSS") was one of the worst performing water utilities in Asian cities.[439] Service coverage was 67 per cent and water availability was only on average 17 hours per day. The underperforming MWSS, which had been providing water services in Metro Manila since the 1880's as a public utility, became obvious target for privatisation.[440]

3 5 3 1 1 The Contracts

Water privatisation in The Philippines began with the 1997 award of two concession contracts for Manila's water and sewerage systems, the biggest water privatisation initiative in the developing world at the time. In 1995, the Water Crisis Act 8041 of 1995 was passed, providing the legal framework for the privatisation of MWSS. The privatisation process was implemented through two concession contracts, in which the private sector entities were given the task of operating and managing the water facilities, whereas MWSS preserved ownership of the infrastructure.[441]

---

[436] SI Hale "Water Privatisation in The Phillipines: The Need to Implement the Human Right to Water" (2006) 15 *Pacific Rim Law and Policy Journal* 765 770.
[437] 770. See also Wolf who notes that the Ramos government supported privatisation as a tool of economic policy. Before the privatisation of the Manila water, the government had already privatised formerly State-owned entities in the banking, power, petroleum, communications and aviation sectors. C Wolf *Manila Water- Privatising Regulated Services in a Developing Country*: *A Case Study* (2007) 3.
[438] Wolf *Manila Water* 3.
[439] 3.
[440] 3.
[441] Hale 2006 *Pacific Rim Law and Policy Journal* 771-773.

The city was carved into two zones for the purposes of privatisation, the east and west zones. The MWSS granted the rights to operate and expand water and sewerage services to two consortia. The east zone was awarded to a consortium led by the US company Bechtel (hereinafter referred to as “Manila Water”). The west zone was awarded to Maynilad and Suez/Ondeo, a joint venture by the French Suez/Ondeo and the Filipino Benpres Holding (hereinafter referred to as “Maynilad”). The concession contracts were for 25 years and included targets with particular focus on coverage, service quality and economic efficiency.[442]

3 5 3 1 2 Contractual expectations

The privatisation agreement contained ambitious benchmarks. It provided for benchmarks on water quality. It also enjoined the private entities to ensure water connections of up to 100% of households in their respective concession areas. Additionally, they were to ensure a twenty-four hour uninterrupted provision of water services in each and every household. The privatisation agreement also aimed to drastically reduce water losses occasioned by damaged pipes and a plethora of illegal connections.[443]

The privatisation concessions were awarded through international competitive bidding, which was regarded as a model of success at the time. However a 2003 study by Water Aid and Tearfund indicate that both the consortia appeared to have made particularly low bids, perhaps on the assumption that the terms of the contract would be changed once it was won.[444]

3 5 3 1 3 Tariff increases

Some commentators have argued that, despite its promise, the privatisation of the MWSS has diminished the public’s access to quality water.[445] Although water tariffs initially declined and services improved in the immediate aftermath of privatisation, both the private operators requested a 15% tariff increases from the regulatory body within two years of the agreement.[446] This was the first of a series of rate increases, which, over the course of nine years, eventually left tariffs 500-700% higher than their

[442] 771-773.
[443] 771-772.
[444] J Esguerra *New Rules, New Roles: Does PSP Benefit the Poor? The Corporate Muddle of Manila's Water Concessions* (2003) 6.
[445] Hale 2006 *Pacific Rim Law and Policy Journal* 772.
[446] 772.

pre-privatisation levels.[447] In the western zone, Maynilad ran into financial difficulties. It then slowed down its investments and in April 2001, Maynilad stopped paying the concession fee to the government. Manila Water, on the other hand, did not initially invest in system expansion in its eastern zone.[448] For most residents of the city, higher rates have resulted in a substantial portion of their income going to water and sewerage services. A 2003 World Bank study found that Manila was one of the worst major Asian cities, second only to Jakarta, in relation to water and sewer access.[449] An Asian Development Bank report further found that as of 2004, approximately 58% of the city was connected to the water network.

3 5 3 1 4 Public health implications

In spite of the privatisation of Manila water and the promised improvements, opponents have pointed out some health implications that have arisen. In 2003, the poor treatment of water by the private entities led to a cholera outbreak which left more than 600 people ill and six dead.[450] A study conducted in the same year by the University of the Philippines' Natural Sciences Research Institute found that Maynilad's water was contaminated with *E. coli* bacteria at 16 per 100 ml of water or more than 700% of the national regulatory standard of 2.2 per 100 ml of water. This gave impetus to the arguments of opponents that privatisation of the water utility had created no meaningful improvements in water quality and failed to meet the standards of the concession agreement.[451]

Targets concerning coverage, as in the *Biwater* experience in Tanzania discussed above, were adjusted downwards with agreement of the regulatory agency. A study of the two concessions concluded in 2002 that both were a "failure" and a "corporate muddle, whereby the supposed benefits of private sector participation disappear, and government and public administrators are seemingly unable to prevent it."[452] Despite the tariff increases and the lowered targets, Maynilad went bankrupt in 2003. After a string of financial, legal and regulatory disputes the concession was bid out again and was bought in 2007. It was acquired by a consortium of the Filipino construction company, DMCI Holdings and the Filipino

[447] 772.
[448] 772.
[449] BS Rivera *Metro Have No Sewer Access* (2005) A17.
[450] Hale 2006 *Pacific Rim Law and Policy Journal* 773.
[451] 773.
[452] Esguerra *New Rules, New Roles: Does PSP Benefit the Poor?* 6.

investment firm, Metro Pacific Investments Corporation (MPIC). Suez continued to hold a 16%-minority share in Maynilad.[453]

3 5 3 1 5 Regulation

Regulation of the two private entities providing and managing water services is performed by the Metropolitan Waterworks and Sewerage System - Regulatory Office (hereinafter referred to as MWSS-RO).[454] Similar to the South African experience discussed above, regulation of the private water providers has been found to be highly unsatisfactory. The functions of the regulatory body includes, among others, handling water users' complaints, contract monitoring and enforcement, and rates review.[455] One of the key challenges pertaining to the MWSS-RO is its lack of independence and expertise in the discharge of its regulatory functions. This was also buttressed by Nils Roseman's study of the Manila water privatisation. Roseman concluded that it was mainly the erroneous design of the privatisation process and the lack of political will to create a powerful regulatory agency that have led to the partial failure of this particular privatisation of Manila water.[456] It has also been highlighted that the haste with which the privatisation of MWSS was carried out resulted in the lack of an adequate regulatory framework for the water sector.[457]

A creature of the concession agreement, the MWSS-RO, has no legislative mandate and hence no statutory independence from the political principal. This shortcoming was exposed in 2001 when the MWSS Board along with the concessionaires' presidents signed termination letters to two deputy regulators who had opposed a request for the hiking of water tariffs.[458] This lack of an independent regulator thus undermined water regulation as a whole.[459]

The right to water, as will be fully discussed in chapter 4, enjoins States to monitor and regulate compliance with the prescripts of the right.[460] Monitoring and regulation are very important, particularly in situations where water services have

---

[453] 6.
[454] NR Chng *Reconceptualising Regulation and the Global South* <http://regulation.upf.edu/dublin-10-papers/1G4.pdf> (accessed 17.06.2011).
[455] 11.
[456] Roseman *The Human Right to Water* 6.
[457] Chng *Reconceptualising Regulation and the Global South* 11.
[458] 11.
[459] 11.
[460] See CESCR *General Comment No 15* (2002) para 51.

been privatised. This helps to ensure that the privatisation of the delivery of water services does not negatively impact on the sufficiency, safety and acceptability, affordability and physical accessibility of water services.[461] The significance of of monitoring and regulating water service providers will be analysed in the last section of this chapter which comprises a human rights assessment of the of the privatisation of water services. The following section discusses the privatisation of water services in Cochabamba, Bolivia.

3 5 4 Bolivia: Cochabamba water privatisation

3 5 4 1 Background

Counselled by IFIs, Bolivia embarked on ambitious economic reforms in the mid-1980s leading to that country's reform process being deemed a textbook application of neoliberal ideals unprecedented in the Americas.[462] Sanchez-Moreno and Higgins point out that the prescriptions of the World Bank and IMF opened up Bolivia's markets to foreign products, and the privatisation of so many State-owned enterprises. The latter measures were embarked upon in a bid to attract foreign direct investment in the economy.[463]

The dominant and visible role of multinational private economic actors in Bolivia has been a particularly contentious and hotly debated issue. In the last two decades, such entities have literally taken over many of the functions previously performed by the State. Multinational private economic actors' presence is particularly pronounced in the petroleum industry as well as the management and distribution of public utilities.[464]

The Bolivian privatisation of Cochabamba's water shows the enormous difficulties associated with water privatisation where the objective is solely full-cost recovery, and is characterised by a lack of consultation with the affected groups.[465] The World Bank had, from the 1990s, demanded privatisation of the Cochabamba's municipal water company, *Servicio Municipal del Agua Potable y Alcantarillado* (hereinafter referred to as SEMAPA). SEMAPA had been operating and managing

[461] Para 54.
[462] M McFarland Sanchez-Moreno & T Higgins "No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia" (2003-2004) 27 *Fordham International Law Journal* 1663 1663.
[463] 1663-1664.
[464] 1664.
[465] T Cruise & C Ramos *Water and Privatisation: Doubtful Benefits, Concrete Threats* (2003) 17.

the Cochabamba's water system since 1967. It has been noted that as of 1997 only 57% of Cochabamba's residents were connected to SEMAPA's water distribution system. The rest obtained water from private wells and vendors. The SEMAPA network was also highly inefficient, experiencing losses of 50% of the water transported.[466] Lack of continuous access to water also resulted in the rationing of water in many parts of the city.[467]

The IFIs pushing for SEMAPA's privatisation regarded it as the only solution to the water problems experienced in Cochabamba, Bolivia's third largest city with an urban population of 600 000. In 1996, the World Bank conditioned a US$ 14 million loan to SEMAPA upon its privatisation. In 1997, the IMF, the World Bank and the Inter-American Development Bank also demanded SEMAPA's privatisation as a condition for debt renegotiation and forgiveness of Bolivia's foreign debt.[468] Bolivia complied with these structural adjustment conditionalities by forging ahead with the privatisation of SEMAPA.[469] At the time of the privatisation of water services in Cochabamba, only 60 percent of the population was connected to the public water supply network. Those not connected to the water supply system relied on water from water vendors. The assumption underlying the privatisation process was that handing over the management and supply of water services to a private entity would not only increase efficiency but liberate public funds for investment in other priority areas.[470]

3 5 4 2 The contract

In 1999, a consortium led by International Water Limited (England), Bechtel Enterprise Holdings (USA) and two companies from Bolivia, ICE Ingenieros and the SOBOCE (hereinafter referred to as "Agua del Tunari") entered into forty-year

[466] See C Vargas & A Nickson "The Limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia" (2002) 21 *Bulletin of Latin American Law* 99 104-107.
[467] 104-107.
[468] Cruise & Ramos *Water and Privatisation* 98.
[469] EP Beltrán *Water, Privatisation and Conflict: Women from the Cochabamba Valley* (2004) iv <http://www.boell.org> (accessed 16.06.2011). In 1997, the World Bank provided Bolivia with US$20 million in technical assistance for regulatory reform and privatisation, including preparation of laws and regulations for the financial, infrastructure and business sectors. Some of this funding was earmarked for the "Major Cities Water and Sewerage Rehabilitation Project" which aimed to provide full coverage to Santa Cruz, Cochabamba and La Paz in the most efficient and sustainable manner. One of the bank's conditions for the extension of the loan was the privatisation of the La Paz and Cochabamba water and sewerage utilities.
[470] See generally I Kornfeld "A Global Water Apartheid: From Revelation to Resolution" (2010) 43 *Vanderbilt Journal of Transnational Law* 701 710-711.

concession agreement to manage the Cochabamba municipal water system.[471] The privatisation agreement granted Agua del Tunari exclusive control over all industrial, agricultural and residential water systems, as well as exclusive control over water rights in natural aquifers.[472] In terms of the $2.5 billion, privatisation agreement, Aguas del Tunari undertook to provide water and sanitation services to the residents of Cochabamba. The privatisation agreement also guaranteed Agua del Tunari a minimum 15% annual return on its investment, which was to be annually adjusted to the United States' consumer price index.[473]

The privatisation agreement specifically gave the private operator exclusive rights of exploitation of rural water supply sources that had traditionally been under the control of indigenous farmers.[474] This move did not endear the government nor the water company to the local population. In effect what the contract did was to give exclusive rights to all of the water in the Cochabamba valley to the water consortium. The intensely farmed Andean mountain valley in which Cochabamba is located, wells and streams are essential sources of drinking water and irrigation for indigenous farmers. The contract negatively interfered with the water rights of these indigenous farmers, which they have enjoyed since time immemorial and had been locally managed independent of external control[475] Aguas del Tunari also undertook to install water meters on private wells and cooperative water supply systems that rural and peri-urban residents had built and financed.[476] Shortly after the privatisation of Cochabamba's water supply and management, water bills arose to between 200% and 300%.[477]

Four months into the privatisation agreement, Bolivia was engulfed by anti-privatisation protests.[478] A consumer rebellion broke out in the Cochabamba, and in rural and peri-urban areas people mobilised against Aguas del Tunari. These joint efforts ended in April 2000 with confrontations between protesters and security

[471] 710. Pervasive corruption and irregularities marked the privatisation process from the very beginning. The first two bidding processes did not succeed, and in the second, only one consortium, *Aguas del Tunari*, submitted a bid. Their conditions and demands of profitability were based on the criteria of full costs recovery from the users. Rather than putting out a call for new bids, the government directly invited *Aguas del Tunari* to take the system, and by doing so, accepted their conditions for doing business in Cochabamba. See Beltrán *Water, Privatization and Conflict* vi.
[472] D Bonnardeaux *The Cochabamba "Water War": An Anti-Privatisation Poster Child?* (2009) 2.
[473] Vargas & Nickson 2002 *Bulletin of Latin American Law* 104-107.
[474] Bakker *Privatisation* 166.
[475] 166.
[476] 166.
[477] Kornfeld 2010 *Vanderbilt Journal of Transnational Law* 710.
[478] 710.

forces, the declaration of a state of emergency, and hundreds of people wounded and one dead.[479] Bakker has noted that a key unifying factor for the disparate group of protesters was the sacredness of water and its cultural resonance for the people.[480] Social discontent was only quelled when the government terminated the Cochabamba water privatisation contract. On 10 April 2000, the government announced a termination of the contract and substantial changes in the law that had covered it and had left self-managed systems and rural customs unprotected.[481]

In response, the water consortium, led by Bechtel, instituted arbitration proceedings at ICSID against the Bolivian government for breach of contract and demanded $25 million in damages under the terms of the Netherlands-Bolivia bilateral investment treaty.[482] In the face of worldwide public condemnation, Bechtel and the consortium abandoned the suit against Bolivia in 2006. Bolivia was also compelled to absolve the private foreign investors of any potential liability.[483]

It is significant to note that the process by which the water privatisation process was embarked upon in Cochabamba never entailed participation with those most affected.[484] The new water law passed to operationalise the contract lacked transparency and public participation. McFarland Sanchez-Moreno and Higgins point out that few opportunities for public input were availed to the public during the privatisation process.[485] In particular, the government made no effort to communicate and disseminate information to the public, particularly those mostly affected like the indigenous farmers, on the privatisation agreement with Agua del Tunari. The government proceeded to pass “the new water law in a hurried and deceptive manner, again undermining public participation.”[486]

Water privatisation can also be a means of ensuring access to water in fulfilment of the right to water. The critical issue is the manner in which any privatisation process is carried out, especially in human rights sensitive areas such as access to water. The privatisation of the Cochabamba's water system on its own did not constitute a violation of the right of access to water.[487] Noteworthy is the fact

[479] Cruise & Ramos *Water and Privatisation* 98.
[480] Bakker *Privatisation* 167.
[481] Cruise & Ramos *Water and Privatisation* 98.
[482] Kornfeld 2010 *Vanderbilt Journal of Transnational Law* 710.
[483] 710.
[484] M McFarland Sanchez-Moreno & Higgins 2003-2004 *Fordham International Law Journal* 1747.
[485] 1747.
[486] 1747.
[487] 1776.

that even before the privatisation of the water management and distribution system in Cochabamba to Aguas del Tunari, the State had failed to fulfill its obligations under the right to water as nearly half of Cochabamba's 600 000 residents lacked access to safe and sufficient water. It is possible the privatisation of Cochabamba's water system may have improved access to clean and safe water to the poor and vulnerable residents of Cochabamba had it been carried out in accordance with the normative standards imposed by the right to water.[488]

The privatisation process of the Cochabamba water supply system raises concerns about the impact of the privatisation on the realisation of the right to water. Of particular concern is the issue of economic accessibility of water, and interference with customary or traditional arrangements for water allocation by handing these over to a private entity without the consent of the affected indigenous farmers.[489] There was a conspicuous lack of transparency and public participation in the decision making process leading to the privatisation of water. This constituted a violation of such procedural safeguards as public consultation and participation. Public consultation and participation with all the stakeholders before and during the privatisation process may possibly have led to substantive changes in the contract to accommodate the community's concerns.[490] The following section consists of an assessment of water privatisations according to human rights principles.

3 6 A human rights analysis of privatisation

International human rights instruments are neutral as regard the economic models of service provision. Consequently, it is permissible within the human rights framework for private entities to be involved in the provision of human rights sensitive services such as water, health and education. Writing over a decade ago, Liebenberg argued that the State should be entitled to rely on private mechanisms of delivery in appropriate circumstances subject to appropriate monitoring and regulation.[491] The CESCR, in General Comment No 3 has also asserted that:

[488] 1777.
[489] 1776.
[490] 1783.
[491] See S Liebenberg "Socio-Economic Rights" in M Chaskalson *et al* (eds) *Constitutional Law of South Africa* (1999) 41-1.

> "[T]he undertaking 'to take steps…by all appropriate means including particularly the adoption of legislative measures neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot be accurately described as being predicated exclusively upon the need for, or the desirability for a socialist or capitalist system, or a mixed, centrally planned, or *laisser-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognised in the Covenant are susceptible of realisation within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognised and reflected in the system in question."[492]

The CESCR has explained that that payment for water services must be based on the principle of equity.[493] This would ensure that water services, whether privately or publicly provided, are affordable to all users including socially disadvantaged groups. In that regard, "[e]quity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households."[494] General Comment 15 further provides that States should take steps to prevent their own citizens and corporations from violating the right to water of individuals and communities in other countries.[495] General Comment 15 further provides that States should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of the right to water in pursuing their activities.[496] General Comment 15 further provides that States may collaborate with the private sector in order to realise the right to water.[497]

---

[492] See CESCR *General Comment No 3* (1990) para 8. A similar position is provided for in para 6 of the Limburg Principles, which provides that "[th]e achievement of economic, social and cultural rights may be realised in a variety of political settings. There is no single road to their full realisation. Successes and failures have been registered in both market and non-market economies, in both centralised and decentralised political structures." The Limburg Principles were adopted by a group of experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America) at Maastricht, Netherlands in June 1986. See *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1986) UN Doc E/CN.4/1987/17.
[493] *CESCR General Comment No 15* (2002) para 27.
[494] Para 27.
[495] Paras 31 & 33.
[496] Para 49.
[497] Para 50.

The gist of the various provisions of the General Comment 15 cited above is to endorse the position that the human rights framework does not dictate any particular model of service provision. Rather, the human rights approach is to leave to the State to determine the most effective ways in which to fulfill their human rights obligations.

The four case studies discussed above reveal the potential deleterious implications of privatisation of water services if human rights imperatives, both substantive and procedural, are not taken into account.[498] Although privatisation of water services, if not properly implemented, may violate both economic, social and cultural rights as well as civil and political rights, this human rights analysis of privatisation will limit itself to the right to water. It will also consider the implications of privatisation of water services on the various components of the right to water.

General Comment No 15 makes it clear that water must be economically accessible. According to the Committee on Economic Social and Cultural Rights (hereinafter referred to as the "CESCR") in General Comment No 15:

> "States parties must adopt the necessary measures that may include, *inter alia*: (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households."[499]

---

[498] The UN High Commissioner for Human Rights (hereinafter "UN High Commissioner") has pointed out some of the detrimental effects privatisation can have on the realisation and enjoyment of economic, social and cultural rights. Privatisation may lead to the "establishment of a two-tiered service supply in a corporate segment focused on the healthy and wealthy and an under-financed public sector focusing on the poor and sick." The other concern raised in the report is the resulting **"**brain drain, with better trained medical practitioners and educators being drawn towards the private sector by higher pay scales and better infrastructures." Among the deleterious consequences of privatisation is private enterprises' "overemphasis on commercial objectives at the expense of social objectives which might be more focused on the provision of quality health, water and education services for those that cannot afford them at commercial rates." Another major concern raised in the UN High Commissioner's report is the challenge of the State in having to deal with an "increasingly large and powerful private sector that can threaten the role of the government as the primary duty bearer of human rights by subverting regulatory systems through political pressure or the co-opting of regulators." See United Nations High Commissioner for Human Rights Economic, Social and Cultural Rights: Liberalisation of Trade in Services and Human Rights: Report of the High Commissioner (2002) UN Doc E/CN 4/Sub 2/2002/9 paras 3a-d.

[499] CESCR *General Comment No 15* (2002) para 27.

The above prescription by the CESCR highlights the principle of equity: vulnerable and poor members of society should not be subjected to a disproportionate burden of paying for water.[500] Exorbitant tariffs leading to lack of affordability of water services would be in breach of the principle of affordability. According to Sanchez-Moreno and Higgins, the right to water imposes a maximum limit on the cost of water in relation to people's ability to pay for it.[501] The CESCR has pointed out that costs associated with securing water must be affordable, and must not threaten the realisation of other rights enshrined in the ICESCR.[502] It therefore means that for water to be regarded as affordable, individuals should be in a position to secure a basic adequate supply for their personal and domestic needs.[503]

The four cases discussed above show that water tariff increases varied from one country to the other though the effects were mostly felt by the poor and vulnerable. In such a case, the State is obliged to take measures to mitigate the impact of the tariff increases, especially on the poor and vulnerable members of society.[504] Any exorbitant tariff increases will always put a tremendous strain on the poor and vulnerable who find themselves threatened with the satisfaction of a basic need such as water, a precondition for the fulfilment of other human rights.

The CESCR has further asserted that the obligation to respect the right to water enjoins the State to refrain from interfering with the enjoyment of the right. The obligation to respect precludes any arbitrary interference with customary or traditional arrangements for water allocation.[505] The new water law, discussed above in the Cochabamba case, provided for charging indigenous people who drew water from their traditional and customary water sources covered by the privatisation agreement.[506] Such provisions interfered with customary arrangements for water allocation thereby constituting a violation of the right to water as elaborated by the CESCR in the paragraph above.[507]

The CESCR has pointed that one of the State's core obligations is the adoption and implementation of a national water strategy and plan of action geared towards addressing the water needs of the whole population. Additionally, the

[500] Para 27.
[501] McFarland Sanchez-Moreno & Higgins 2003-2004 *Fordham International Law Journal* 1777.
[502] CESCR *General Comment No15* (2002) para 27.
[503] McFarland Sanchez-Moreno & Higgins 2003-2004 *Fordham International Law Journal* 1777.
[504] 1778.
[505] CESCR *General Comment No15* (2002) para 21.
[506] McFarland Sanchez-Moreno & Higgins 2003-2004 *Fordham International Law Journal* 1779.
[507] 1779.

strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process.[508] International human rights law requires that policies must be devised and implemented and in a manner that allows for public consultation and participation.[509] Privatisation of water services necessarily raises the issue of accountability of both local authorities and private entities involved in the management or provision of water services. The CESCR has further emphasised the significance of public participation in decision-making and public access to information concerning water issues, noting that:

> "The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. The right of individuals and groups to participate in decision-making processes, that may affect their exercise of the right to water, must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties."[510]

General Comment No 15 provides for the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water as indicated above. This, according to Sanchez-Moreno and Higgins, means that the realisation of the right to water mandates a more direct opportunity for participation in decisions affecting water than is afforded by ordinary democratic processes.[511] It is thus of utmost importance that privatisation policies entrench legal and administrative measures to guarantee democratic accountability, particularly by those affected by the privatisation of a particular service.[512] Such an approach is in sync with "meaningful engagement", a concept that has gained currency in South Africa over the last few years primarily through a series of Constitutional Court judgments relating to cases of evictions of poor people from their dwellings.[513] In these decisions, the courts have compelled the State to "meaningfully engage" with

---

[508] CESCR *General Comment No15* (2002) para 37.
[509] S Tsemo "Privatisation of Basic Services, Democracy and Human Rights" (2003) 4 *ESR Review* 1 2.
[510] CESCR *General Comment No15* (2002) para 48.
[511] McFarland Sanchez-Moreno & Higgins 2003-2004 *Fordham International Law Journal* 1782-1783.
[512] Chirwa 2004 *Law, Democracy and Development* 185-186.
[513] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) par 297.

those they want to evict before pursuing the actual forced removal.[514] This means that the representative role of public authorities is not enough and cannot be used as a substitute to satisfy the right to participate in decisions concerning water.[515]

One of the key issues raised in the above cases of privatisation is the paucity of effective monitoring mechanisms to ensure realisation of the right to water notwithstanding the privatisation of water delivery services. The duty to regulate and monitor enjoins the State to take appropriate positive action to protect its citizens from potentially deleterious acts of private actors.[516] The State has an obligation to prevent third parties from threatening access to equal, affordable, sufficient, safe and acceptable water.[517] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (hereinafter referred to as "Maastricht Guidelines") enshrine a similar approach, providing that, in the interpretation of economic, social and cultural rights, the State has a duty to ensure that the private entities over which they exercise jurisdiction do not deprive individuals of their economic, social and cultural rights.[518] The Maastricht Guidelines further provides for the responsibility of States for any violations of economic, social and cultural rights that result from their neglect to exercise the necessary control on the behaviour of such non-State actors.[519] The State will only fulfill this duty to protect through the establishment of an effective regulatory system. Such a regulatory system, to be effective, must provide for independent monitoring, genuine public participation and provision of appropriate relief to those negatively impacted by the acts of such non-State actors.[520]

The critical issue becomes how the role of the State changes in the context of privatisation.[521] It must be noted that privatisation does not relieve the State of its legal responsibility under international human rights law.[522] States are the primary duty bearers under the international human rights system. It necessarily means that States do not relinquish their international human rights obligations by privatising the

[514] See L Chenwi & K Tissington *Engaging Meaningfully with Government on Socio-Economic Rights – A Focus on the Right to Housing* (2010) 9.
[515] McFarland Sanchez-Moreno & Higgins 2003-2004 *Fordham International Law Journal* 1783.
[516] Chirwa 2004 *African Human Rights Law Journal* 235.
[517] CESCR *General Comment No 15* (2002) para 24.
[518] See The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly* 691 698.
[519] 698.
[520] CESCR *General Comment 15* (2002) para 24.
[521] For further discussion see chapter 4 which builds on and analyses in greater detail the nature of the State's obligations while chapter 5 focuses on the obligations of non-State actors.
[522] Vandenhole & Wilders 2008 *Netherlands Quarterly of Human Rights* 409-410.

delivery of water services. A State should ensure that it continues to exercise adequate regulatory oversight in order to meet its obligation to realise the right to water when it engages non-State actors to manage and supply water services.

3 7 Conclusion

The past two decades have witnessed a trend in all the regions of the world to roll back the State and increasingly rely on the market as the distributor of goods and services. The State is no longer considered as the provider but the regulator. This chapter has highlighted the increase in privatisation of human rights sensitive areas such as water provision. In the water services sector, it has been shown that the concept of water as an economic good and the principle of full cost recovery have catalysed the privatisation of water services provision across the world. Private enterprises are taking control of the management, operation and ownership of public water systems. The result is that water has increasingly become subject to the rules and powers of markets and prices have been set for water services previously provided for free.

A human rights approach to water privatisation mandates that privatisation of water services should have as its key objective the realisation of the right to water, especially by those currently unserved or underserved. Most significantly, any water privatisation initiative should be guided by the principles of indivisibility and interdependence of all human rights, non-discrimination, consultation and public participation, information accessibility and accountability mechanisms.

Insufficient efforts have been made by governments and IFIs to assess the risks and limitations of water privatisation, and to put in place measures and standards to govern water privatisation processes. The State has an obligation imposed by the right to water to protect individuals and communities from the deleterious acts of non-State actors. Within the context of privatisation of water services, the State is enjoined to adopt legislative and other measures to regulate and monitor the conduct of non-State actors involved in the provision of water services. Most significantly, the State is further obliged to take measures aimed at ensuring access by everyone to water for personal and domestic uses. This obligation entails the requirement to adopt special measures in favour of

disadvantaged and vulnerable groups such as subsidies, cross-subsidies and other intervention mechanisms.

The State's duty to protect human rights against violations by private actors is an integral component of State responsibility under human rights treaties and customary international law. A State may be liable for a breach of its obligations should it fail to take appropriate steps to prevent, investigate, punish and remedy such violations. The involvement of non-State actors in the provision of water services necessarily implies that a shift in emphasis takes place. The State, by privatising the delivery of water services, does not divest itself of its human rights obligations to ensure the realisation of access to water services. Although a privatisation arrangement may mean that the private actor is the direct provider of the service, the State retains regulatory and oversight responsibilities, to ensure that the private actor provides the service in accordance with human rights norms and standards. If this cannot be assured, the State must either avoid or withdraw from privatisation arrangements.

This means that States should establish regulation and control mechanisms, which include independent monitoring, genuine public participation and the provision of remedies for non-compliance.[523] The CESCR has pointed out that arbitrary disconnection from water services and discriminatory or unaffordable increases in the price of water constitute *prima facie* violations of the States' obligation on the realisation of the right to water.[524] Such safeguards are very significant for the protection of the human right to water in the event of involvement of non-State actors in the provision of water services.

The following chapter will discuss and analyse the obligations and duties which the right to water impose on State actors. Drawing on General Comment 15 on the right to water as well as the jurisprudence of international, regional and national courts, the chapter will also highlight the duties the right to water imposes on the State in relation to the involvement of private actors in the water services sector.

[523] See CESCR *General Comment No 15* (2002) paras 23–24.
[524] Para 44(a).

Chapter 4

State obligations imposed by the human right to water

4 1 Introduction

One of the cardinal developments in international human rights theory and practice is the development of typologies to elaborate the nature of obligations imposed by human rights instruments. From the early 1980s, scholars started commenting on the nature and types of obligations that human rights treaties impose on States. Henry Shue, for example, proposed an approach of analysing State duties that went beyond the traditional hypothesis of a single correlative duty for each right.[1] An approach emerged in terms of which State obligations under international human rights treaties were analysed as entailing three types or levels of obligations, the obligations to respect, protect and fulfill the rights in question.[2] The method of analysis deployed by treaty monitoring bodies' view State obligations in terms of this typology.[3]

This study will focus on the practice of treaty monitoring bodies under international human rights treaties and regional adjudicative mechanisms under regional systems for the protection of human rights. Although the main focus of this chapter is on the obligations imposed on States under international human rights law, the chapter will also analyse national jurisprudence from select jurisdictions. This will assist in illuminating to what extent, if any, national courts have applied the typologies approach in their interpretation of respective national constitutions and legislation providing for the right to water. This study will also pay special attention to the work of the Committee on Economic, Social and Cultural Rights (hereinafter

[1] See See H Shue *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980) 52. See also for a further elaboration of the typologies approach to the analysis of State obligations imposed by human rights, See H Shue "The Interdependence of Duties" in P Alston & K Tomaševski *The Right to Food* (1984) 83 85.

[2] A Eide "Economic, Social and Cultural Rights as Human Rights" in A Eide, C Krause & A Rosas *Economic, Social and Cultural Rights* (2001) 23-24. See also Craven who points out that not only does such an approach provides a detailed analytical framework in which a clearer understanding of State obligations in respect of human rights may be achieved, but also serves to counteract some of the traditional assumptions that tended to distinguish economic, social and cultural rights from civil and political rights. This is because the obligations to respect, protect and fulfill can be identified in respect of every human right thereby counteracting the notion that economic, social and cultural rights are solely "positive rights" anymore than civil and political rights being solely "negative rights". M Craven *The International Covenant on Economic Social and Cultural Rights: A Perspective in Its Development* (1995) 109.

[3] Craven *The International Covenant* 109.

referred to as the "CESCR"),[4] as this is the body mandated to monitor State compliance with the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the "ICESCR")[5]. It must however be noted that other treaty monitoring bodies have also significantly contributed to the elaboration of State obligations imposed by human rights instruments. These will be considered where relevant. It is pertinent to note that Shue's analysis was not limited to States as the only duty bearers. His analysis of duties developed a classification of all duties imposed by human rights which should be implemented by States, individuals and institutions.[6]

This chapter seeks to provide a detailed analysis of the obligations that the right to water imposes on States. It outlines and evaluates the approach of treaty monitoring bodies, customary international law, reports of the Special Rapporteur on the right to water and the jurisprudence of regional and national judicial and quasi-judicial bodies in elucidating the scope of the obligations imposed by socio-economic rights in general and the right to water in particular. Identifying obligations imposed by the right to water is fundamental to the accountability model developed in chapter 6. Significantly, States need to know what they are obliged to do in order to comply with their obligations engendered by the right to water.[7]

This chapter is divided in four major parts. The first part describes and analyses the origins and development of typologies of State duties as well as their

[4] The Committee on Economic, Social and Cultural Rights (CESCR) is a treaty body of independent experts mandated with monitoring State compliance with the International Covenant on Economic, Social and Cultural Rights.The CESCR's first explicit statement on typologies of State duties was the *Outline for the Drafting of General Comments on Specific Rights of the International Covenant on Economic, Social and Cultural Rights* (1999) UN Doc E/C.12/1999/11, Annex IX. The outline suggested dividing general comments into six sections, "the introduction," "normative content of the right," "State party's obligations," "obligations of other relevant actors," "violations," and "recommendations for States." The section on "State parties' obligations" expressly refers to the typologies of State obligations (i) Immediate obligations; obligations of progressive realisation, (ii) Obligations of conduct; obligations of result and (iii) Obligations to respect, to protect and to fulfill, and obligation to promote. See parts III & IV of the outline. Some scholars have criticised the tripartite typology as a simplification of the nature of State obligations imposed by human rights treaties. Koch, in particular, has highlighted the limitations of the tripartite typology as regard the issue of justiciability of economic, social and cultural rights. See IE Koch *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (2009) 13-20. Koch drew much of her criticism from her earlier article; IK Koch "Dichotomies, Trichotomies and Waves of Duties" (2005) 5 *Human Rights Law Review* 81-103. For other scholars who have voiced their criticism of the typologies approach, see J Waldron *Liberal Rights: Collective Papers 1981-1991* (1993) 25.

[5] International Covenant on Economic, Social, and Cultural Rights (1966) UN Doc A/6316.

[6] See Shue *Basic Rights* 52.

[7] MM Sepulveda *Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 4.

significance. The second part analyses in detail the obligations imposed on States by the right to water. It explores the scope of the duties to respect, protect, fulfill and promote the right to water. It further analyses the State's duty to monitor and regulate the privatisation of water services as part of its protective mandate. The third part will discuss the concept of minimum core obligations as it relates to the right to water. It will discuss and analyse those obligations the ICESCR has deemed to be of an immediate nature, the obligations to take steps and the obligation to guarantee realisation of the right to water without discrimination. This will be followed by an exploration of the concept of "progressive realisation" of the right to water as provided for in international human rights treaties such as the ICESCR and elaborated by the CESCR, academic literature, and relevant case law in respect of the right to water. This part will further explore the concepts of "retrogressive measures" and "availability of resources" as they relate to the realisation of the right to water. The final part will discuss and analyse selected leading jurisprudence from regional and national courts to assess how the right to water has been judicially enforced. Particular attention is paid to how judicial organs have enforced the right to water in light of the analytic paradigm of respect, protect, promote and fulfil.

4 1 1 Origin and development of typologies of State obligations

The ICESCR and the ICCPR, part of the international Bill of Human Rights adopted in 1966 after lengthy and protracted debates, reflected the ideological cleavages and polarisation engendered by the cold war. During the debates preceding the adoption of the above treaties, the notion had gained currency that civil and political rights were fundamentally different from economic, social and cultural rights.[8] This led to the emergence of two conceptions of human rights. On one hand, was an approach strongly espoused by the United States (hereinafter referred to as the "the US") and other Western countries. This block conceived the role of human rights as a mechanism to ensure the freedom of the individual from arbitrary State interference. Linked to this approach was the notion that civil and political rights only imposed duties of abstentation on the State to refrain from interference in the fundamental freedoms of the individual.[9] On the other hand, Socialist countries conceived the role of human rights to be ensuring freedom and security through an active role for the

[8] A Eide "State Obligations for Human Rights: The Case of the Right to Food" in O Hospes & I Hadiprayitno *Governing Food Security: Law, Politics and the Right to Food* (2010) 112.
[9] 112.

State in the satisfaction of all basic needs.[10] Socio-economic rights were thus considered mainly to consist of duties imposed on the State to use its resources to provide for the needs of the people.[11] This rather simplistic conception of human rights substantially contributed to the decision to split the human rights enshrined in the Universal Declaration of Human Rights (hereinafter referred to as the "UDHR") into two separate instruments in 1966, the ICCPR and the ICESCR.[12]

Human rights activists, judicial and quasi-judicial mechanisms and academic commentators began to challenge the assumption that civil and political rights were only passive and cost-free, and that socio-economic rights always required costly positive State interventions through the provision of resources.[13] The American political philosopher, Henry Shue, is credited as being the first to introduce the concept of human rights instruments imposing a typology of obligations on States.[14] According to this typology, all human rights entail three forms of State obligations, the obligations to respect, protect and fulfill rights, commonly referred to as the "tripartite typology."[15] Writing in 1980, Shue pointed out that there was no distinction between rights.[16] Rather, the useful distinctions are among duties as "there are no one-to-one pairings between kinds of duties and kinds of rights."[17] Shue argued that the effective protection of all human rights, be they civil and political, or economic, social or cultural, require a combination of negative duties of restraint on the State, and positive duties to protect and ensure the rights.[18] Shue thus proposed a "tripartite typology of duties."[19] This approach emphasised the distinction between the duty to avoid depriving and the duty to protect human rights beneficiaries from deprivation by other people or institutions. This could be done through designing and enforcing an

[10] 112.
[11] 112.
[12] 112.
[13] For instance, it was pointed out that the effective functioning of an adequate system of courts and law enforcement apparatus (including legal aid where necessary) requires State resources as does the operation of political systems based on elections which require funding and far-reaching positive measures to achieve an appropriate electoral and administrative system. Conversely, in the realm of economic, social and cultural rights, many socio-economic rights such as the right of everyone to work, to form trade unions or the right to establish private educational institutions impose on the State obligations to respect these rights. See Eide "State Obligations" in *Governing Food Security* 113. The duty to respect is fully explained in 4 1 3 below.
[14] Shue *Basic Rights* 52. See also Sepulveda who notes that the "tripartite typology" proposed by Shue in 1980 "has evolved and scholars have developed typologies containing more than three levels." See Sepúlveda *Obligations* 157.
[15] Shue *Basic Rights* 52.
[16] 52.
[17] 52.
[18] 52.
[19] 52.

appropriate regulatory system and designing institutions to prevent violations of human rights. Included in Shue's typology is the duty to aid the deprived.[20] This entails the duty to ensure social and economic security for those who are not able to provide for themselves owing to, for example, being the victims of natural disasters or social failures in the performance of duties.[21] According to Shue, the duty to aid, which is largely a duty of recovery, is owed to victims of rights violations from failures in the performance of the duties to respect and protect. In support of this typology of duties, Shue persuasively argued that:

> "For all its own simplicity, [the typology]...goes considerably beyond the usual assumption that for every right there is a single correlative duty, and suggests instead that for every basic right – and many other rights as well – there are three types of duties, all of which must be performed if the basic right is to be fully honoured but not all of which must necessarily be performed by the same individuals or institutions."[22]

Shue's typology was further developed and introduced in the United Nations (hereinafter referred to as the "UN") system by Asborn Eide, Special Rapporteur to the then UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities[23] and thereafter UN Special Rapporteur on the Right to Food.[24] Eide proposed a tripartite typology and, in his 1987 report as the UN Special Rapporteur on the Right to Food, subsequently distinguished between the obligations to respect, protect and fulfill human rights.[25] In recent studies, Eide has further refined his approach and added a fourth level, the obligation to facilitate. The latter obligation requires the State to create opportunities by which rights can be enjoyed. Eide refers, as an example, to article 11(2) of the ICESCR which enjoins States to improve

---

[20] 52.

[21] 52.Shue further elaborates, noting that:

> "The description in terms of fulfilment and promotion suggests that the rest of us would be going beyond duties to respect and to protect if we acted upon duties to fulfill and promote. The rights of some people need to be 'fulfilled' or 'promoted', however, because other people have already failed to perform duties to respect and protect. Rather than going beyond respect and protection, we are having to go back and make up for failures in respect and protection. This is more clearly conveyed by saying that we are assisting the deprived. If our assistance enables them to enjoy adequate food, physical security, or whatever else they have been deprived of, their right will in fact have been fulfilled." See H Shue "The Interdependence of Duties" in P Alston & K Tomasevski (eds) *The Right to Food* (1985) 83 86.

[22] Shue *Basic Rights* 52.

[23] Eide "State Obligations" in Hospes & Hadiprayitno *Governing Food Security* 113.

[24] For a discussion on the origins of the typologies of State obligations, see O de Schutter *International Human Rights: Cases, Materials, Commentary* (2010) 241-244; Sepúlveda *Obligations* 157-164.

[25] See A Eide *UN Special Rapporteur for the Right to Food, The Right to Adequate Food as a Human Right:* (1987) UN Doc E/CN.4/Sub.2/1987/23 paras 67–69.

measures of production, conservation and distribution of food by making full use of technical and scientific knowledge and by developing or reforming agrarian systems.[26] Eide underscored the importance of clarifying the correlative duties imposed by rights as such duties are not spelled out in great detail in the main human rights instruments. International and regional judicial human rights mechanisms, UN independent experts and special rapporteurs, academic literature and the practice of treaty monitoring bodies have played a pivotal role in gradually elaborating the nature and scope of duties that various human rights impose on States.[27]

The effective protection and guarantee of human rights recognises that international human rights law imposes a combination of negative and positive duties.[28] It is now generally accepted that obligations imposed by human rights instruments, both civil and political rights and socio-economic rights, impose at least four levels of duties on the State.[29] These are the duties to respect, protect, promote and fulfill human rights.[30] Treaty bodies such as the CESCR have increasingly embraced the respect, protect, promote and fulfill typology as a framework for analysing and clarifying the nature and scope of State obligations imposed by international human rights treaties. The CESCR was the first UN treaty body to embrace the typology in its General Comment 12 on the right to food.[31] It is,

---

[26] A Eide "Universalisation of Human rights versus Globalisation of Economic Power" in F Coomans, F Grunfeld, I Westerndorp & J Willems (eds) *Rendering Justice to the Vulnerable: Liber Amicorum in Honour of Theo van Boven* (2000) 99 110-111.

[27] Eide "Economic, Social and Cultural Rights as Human Rights" in *Economic, Social and Cultural Rights* (2001) 22.

[28] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 83.

[29] The Committee on Economic, Social and Cultural Rights (CESCR) has adopted the quartet of State obligations in elucidating the obligations imposed by the various provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) though the obligation to promote tends to be encapsulated under the obligation to fulfill. See for example United Nations Committee on Economic, Social and Cultural Rights *General Comment 19, The Right to Social Security (art. 9)* UN Doc E/C.12/GC/19 (2008) paras 47 & 49; United Nations Committee on Economic, Social and Cultural Rights *General Comment 18, The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights* (2006) UN Doc E/C.12/GC/18 para 28; United Nations Committee on Economic, Social and Cultural Rights *General Comment 15, The Right to Water* (2002) UN Doc E/C.12/2002/11 para 25; United Nations Committee on Economic, Social and Cultural Rights *General Comment 16 The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights* (2005) UN Doc E/C.12/2005/3 (2005) para 21.

[30] See *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 para 44.

[31] See United Nations Committee on Economic, Social and Cultural Rights *General Comment 12, Right to Adequate Food* (1999) UN Doc E/C.12/1999/5 para 15 where the CESCR stated that "[t]he right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfill* incorporates both an obligation to *facilitate* and an obligation to *provide.*"

however, noteworthy that in all the General Comments that the CESCR has adopted up to date, the duty to promote is incorporated under the duty to fulfil. This is different from the approach of the African Commission on Human and People's Rights (hereinafter referred to as "the African Commission") where the duty to promote is treated as a stand-alone duty.[32] The African Commission has analysed the obligations imposed by the African Charter on Human and People's Rights (hereinafter referred to as "the African Charter") as imposing four levels of State obligations, the duties to respect, protect, promote and fulfill human rights. The African Commission deployed this approach in its decision in *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (hereinafter referred to as "SERAC") as an analytical tool to gauge Nigeria's human rights obligations under the African Charter.[33] The SERAC case will be analysed in detail below.[34]

Some academic commentators such as Koch have criticised the use of typologies as an analytical tool to delineate State obligations imposed by human rights treaties as a simplification of the issue.[35] Koch observes that the negative features of the obligation to respect have been used to buttress the argument that socio-economic rights are justiciable rights. Koch questions whether there is such a thing as a negative obligation as "one can hardly think of an obligation not to interfere which does not require some sort of positive measure."[36] This is because the distinction between negative and positive duties "is not a static or immutable quality of rights."[37] Koch has questioned the insertion of the obligation to protect between the "predominantly negative" obligation to respect and the "predominantly positive" obligation to fulfill in the tripartite approach.[38] Koch's view is that the extension of State obligations to private disputes is a rather complex issue with many aspects due

[32] See the African Commission decision in *The Social and Economic Rights Centre & the Centre for Economic and Social Rights v Nigeria* Communication 155/96, Ref.ACHPR/COMM/A044/1 (2002) para 44.
[33] See *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 paras 44-48. The case is fully discussed in section 4 3 5 2 below.
[34] See 4 3 5 2 below for a discussion of the *SERAC* case.
[35] IE Koch *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (2009)13-14. Koch argues that the classification of State duties in terms of typologies is of little practical use due to the conception of the duty to respect as less demanding than the duty to fulfil. In that way, the typologies have become "straitjackets" rather than helpful analytical tools. See IE Koch "Dichotomies, Trichotomies and Waves of Duties" (2005) 5 *Human Rights Law Review* 81 103.
[36] Koch *Human Rights* as *Indivisible Rights* 17.
[37] Liebenberg *Socio-Economic Rights* 86.
[38] Koch 2005 *Human Rights Law Review* 19.

to increasing privatisation. Such a complex issue might not be addressed adequately if discussed in the context of human rights typologies.[39] Koch further questions the assumption that the obligation to protect is always more positive than the obligation to respect and always less positive than the obligation to fulfil. She points out that:

> "the obligation to protect does not necessarily call for steps which are naturally to be placed on a scale in between a predominantly negative obligation not to interfere and a predominantly positive obligation to provide. Preventing third parties from interfering with a certain right does not necessarily require a more active and more costly effort than preventing public bodies from acting in the same way (obligation to respect)."[40]

Koch though concedes that the tripartite typology has some applicability in deciding what it takes in a concrete situation for a State party to comply with its human rights obligations.[41] She however points out that many situations cannot be dealt with exclusively by means of one of the three levels of the tripartite obligation.[42] This is because some situations "are so complex that they require efforts belonging to all three levels, respect, protect and fulfilment."[43] For instance, the notion that the State's duty in respect of human rights enjoins only inaction and non-interference on the part of the State is reminiscent of the liberal political philosophy that advocates for a minimalist State which interferes as little as possible in the individual's autonomy and freedom. Such an approach creates a situation where those who have enjoyed their human right to water continue to benefit from their prevailing advantageous position while the situation of those who have not had access to the enjoyment of the right remains unchanged. It is often assumed that the implementation of the obligation to respect generally does not involve resource distribution or re-allocation measures.[44] Consequently, it does not help to ameliorate the conditions of the less privileged and disadvantaged members of society to realise

---

[39] 19.
[40] Koch further points out that "[i]f we ignore non-State actors, which is possible, what has only been achieved is only the substitution of the traditional positive/negative dichotomy with another dichotomous relationship between obligations to respect and obligations of fulfilment." See Koch *Human Rights* 18-19.
[41] 19.
[42] 20.
[43] Koch *Human Rights* 20. Koch further argues that"[t]he closer one gets to the complexity of the problems of everyday life the more frequently one would encounter the fact that the response to a concrete social demand requires measures of considerable complexity sometimes defying classification as relating exclusively to either respect, protection or fulfilment." See Koch 2005 *Human Rights Law Review* 93
[44] Eide "State Obligations for Human Rights" in *Governing Food Security* 113.

the right to clean and adequate water for personal and domestic uses. Such an approach is not capable of challenging the patterns of social exclusion that might be extant in a particular society.

Bruce Porter also argued against the futility of distinguishing between positive and negative duties.[45] Porter cites, as an example, the need to install wheelchair ramps and elevators in public buildings as positive measures required to secure equality of participation in society by people living with disabilities.[46] Porter's argument is that to define a right only in terms of the nature of the State obligation to provide does not challenge patterns of social exclusion that necessitate the need for the adoption of positive measures.[47]

Liebenberg has appropriately warned that categorising a case in terms of the duty to respect, protect, promote and fulfill rights should not be determinative of the interpretative approach to the rights in issue.[48] The kind of measures required of the State in a particular situation should be predicated on "a contextual evaluation of what types of actions...needed in the particular circumstances to secure the effective enjoyment of the relevant rights."[49]

This dissertation will adopt the quartet layer of State obligations as elaborated by the African Commission. The use of a quartet layer of State obligations as an analytic tool will enable a systematic elaboration of the nature of obligations which human rights impose on States. It provides guidelines to States, groups and individuals on the interconnected and interdependent nature of the duties that must be complied with to achieve full protection of human rights such as the right to water.

4 1 2 The importance of categorising State obligations

The primary responsibility for the realisation of human rights rests with the State in which the persons concerned live.[50] States are contracting parties to international and regional human rights treaties; hence they are principally responsible for their

[45] B Porter "The Crisis of ESC Rights and Strategies for Addressing It" in J Squires, M Langford & B Thiele (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) 43 55-56.
[46] 55-56.
[47] 55-56.
[48] Liebenberg *Socio-Economic Rights* 87.
[49] 87
[50] Art 2(2) of the ICESCR provides that "[t]he State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind." See also Eide "Economic, Social and Cultural Rights as Human Rights" in *Economic, Social and Cultural Rights* 22.

implementation.[51] The 1993 Vienna Declaration and Programme of Action affirms that human rights and fundamental freedoms are the birth right of all human beings and emphasises that their protection and promotion is the first responsibility of States.[52] Furthermore, the principle of subsidiarity provides that the primary actor for the implementation and enforcement of internationally protected human rights is the State party to the treaty.[53] This is also consistent with the rule of exhaustion of domestic remedies in which a State must be given the opportunity to remedy an alleged wrong within the framework of its own domestic legal system before its international responsibility can be adjudicated at the level of regional or international organs.[54] International human rights standards and mechanisms are there to augment and complement the domestic human rights standards, consistent with the subsidiarity principle.[55]

The typologies approach has shattered the illusion that each set of human rights falls into a neat, compartmentalised category.[56] It is now accepted in doctrine and jurisprudence that each human right imposes a variety of obligations.[57] The degree of emphasis on any particular duty ultimately depends on the type of rights under consideration as well as the relevant contextual situation. The need to meaningfully enjoy some of the rights in a particular context may for example demand positive action from the State in terms of more than one of the duties.[58]

---

[51] DM Chirwa "Privatisation of Water in Southern Africa: A Human Rights Perspective" (2004) 4 *African Human Rights Law Journal* 218 232.

[52] See United Nations *Vienna Declaration and Programme of Action* (1993) UN Doc A/CONF.157/23. See also Eide who states that the purpose of the international human rights conventions is to create legally binding obligations for States to implement the human rights protections and guarantees in such instruments. See Eide "State Obligations" in *Governing Food Security* 111.

[53] Although it has its roots in canonical law, in particular the Papal Encyclical of 1931 entitled *Quadragesimo Anno*, the principle of subsidiarity is applicable to various aspects of government, politics, management and particularly important in supranational and federal systems of government. It postulates that a central authority should have a subsidiary function, and should only perform those tasks which cannot be effectively performed at the local level. The principle is reflected in the Tenth Amendment to the US Constitution and article 70 of the Germany Basic Law and has become part of the European Union law. See C Shasho-Landau "Reflections of the Principle of Subsidiarity in the European Union" (1996) 13 *Ilan Law Studies* 301 303-304. The principle of subsidiarity has been used mainly in federal systems such as the US and the EU constitutional discourse and it is therefore uncertain whether it has become a general principle of international law.

[54] See AAC Trindade *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (1983) 1.

[55] See PG Carozza "Subsidiarity as a Structural Principle of Human Rights Law" (2003) 97 *American Journal of International* Law 38 38.

[56] Sepúlveda *Obligations* 12.

[57] See Eide, pointing that the "active" and "passive" duties imposed on States by human rights are cross-cutting on the entire spectrum of human rights. Eide "State Obligations" in *Governing Food Security* 113.

[58] *SERAC* v *Nigeria* para 48.

Analysing the different kinds of duties imposed on the State by a particular right using the respect, protect, promote and fulfill typology makes it easy to understand the specific State action required for the implementation of a right.[59]

Human rights treaties generally deploy different formulations in their provisions with regard to States obligations. The ICCPR, for instance, obligates States to "respect and ensure" the rights provided in that instrument.[60] This should be contrasted with the ICESCR which enjoins States to "undertake to take steps…to the maximum of its available resources, with a view to achieving progressively the full realisation" of the human rights guaranteed in that instrument.[61] The Revised European Social Charter (hereinafter referred to as "the European Charter") provides that Contracting parties consider themselves bound by the obligations laid down in that treaty.[62] The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "European Convention on Human Rights") mandates Member States "to secure"[63] the rights whereas the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities imposes on States an obligation "to ensure and promote" the rights.[64] The African Charter, on the other hand, requires State Parties "to recognise the rights, duties and freedoms…and undertake to adopt legislative or other measures to give effect to them."[65] It is pertinent to note that as part of the obligations imposed by the above treaties protecting socio-economic rights, States are enjoined to take steps with a view to achieving progressively the rights, including the adoption of legal measures.[66] The major exceptions are the African Charter and the Convention on the

[59] Sepulveda *Obligations* 12.
[60] See article 2 of the International Covenant on Civil and Political Rights (1966) 999 UNTS 171.
[61] See article 2(1) of the ICESCR.
[62] See Revised European Social Charter (1996) ETS no 35 Part II.
[63] See article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 222.
[64] See article 4 of the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (2006) UN Doc A/61/49**.**
[65] See article 1 of the African Charter on Human and Peoples' Rights (1981) OAU Doc CAB/LEG/67/rev.5.
[66] See for example article 2(1) of the ICESCR and article 4(2) of the International Convention on the Rights of Persons with Disabilities (2006) UN Doc A/AC.265/2006/L.6 (hereafter "The Disability Convention"). See also Eide "Economic, Social and Cultural Rights" in *Economic, Social and Cultural Rights: A Textbook* 17. Eide points out that the adoption of such legislative measures constitutes a process of "positivisation" of economic, social and cultural rights at the national level. Eide however argues that the transformation of economic, social and cultural rights into positive law at the domestic level is not enough. The rights must be realised in fact, which may require comprehensive administrative measures and social action. See also Epp who argues that "[i]n the modern state, rights are empty promises in many contexts unless they are given life in administrative policies and

Rights of Child which do not explicitly enshrine the "progressive realisation" clause in the treaty texts.

The typology of State obligations is an important analytical tool in elaborating the duties that human rights such as the right to water impose on States.[67] Elaborating State obligations in this way highlights the fact that States have an active role to play in the implementation of human rights, rather than a mere obligation of non-interference with the enjoyment of human rights. As noted by Leckie, this methodology of outlining State duties has proven a durable means of establishing State accountability for the enforcement of socio-economic rights.[68] Additionally, using the respect, protect, promote and fulfill analytic model has greatly assisted towards clearly "identifying, deconstructing and redressing violations of these rights."[69]

Article 2(1) of the ICESCR is central as an interpretive guide to the definition of State obligations imposed by the ICESCR. Craven has emphasised that the value of the ICESCR as a human rights guarantee is predicated upon a clear understanding of the precise nature of the State obligations found in article 2(1).[70] This is particularly so given the need to properly understand the import of "obligation to take steps," to the "maximum of available resources" provisions in article 2(1). Scott and Alston have pointed out in respect of the "availability of resources" component that "it is one of the single most complex and misunderstood dimension of economic and social rights."[71] National judicial organs have also at times misconstrued the concept of progressive realisation, resulting in the latter acquiring a "process-oriented meaning" rather than imposing an obligation to improve the quality of people's access to socio-economic rights on a progressive basis.[72] The concept of progressive realisation is discussed below.

Adopting the quartet of obligations framework, the human right to water imposes four types of obligations on the State, the obligations to respect, the

---

practices." C Epp "Implementing the Rights Revolution: Repeat Players and the Interpretation of Diffuse Legal Messages" (2008) 71 *Law & Contemporary Problems* 41 42.

[67] Sepúlveda *Obligations* 12 and 172.

[68] S Leckie "Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 81 91.

[69] 91.

[70] Craven *State Obligations* 151.

[71] C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise" (2000) 16 *South African Journal on Human Rights* 206 262-263.

[72] See Liebenberg *Socio-Economic Rights* 470.

obligations to protect, obligations to fulfill and the obligations to promote the right to water.[73] In line with all human rights, the right to water contains both freedoms and entitlements.[74] The freedom component of the right to water entails non-interference with existing access in order to maintain access to existing water supplies necessary for the realisation of the right to water. This includes the right to be free from disconnections from basic essential levels of water supplies.[75] The entitlements component of the right to water include the right to a system of water supply and management that facilitates the right of people to enjoy access to water in an equitable manner.[76]

The following section analyses the concrete duties imposed on States by the right to water as elaborated by the practice of the CESCR in its analysis of State obligations engendered by the ICESCR through General Comments and Concluding Observations, the Committee on the Elimination of Racial Discrimination as well as the interpretive work of UN independent experts and special rapporteurs. This section will also discuss interpretations of other treaty bodies such the African Commission, the Inter-American Court and Commission and the European Committee of Social Rights.

4 2 Nature of State Obligations

4 2 1 Obligation to respect

In its traditional sense, the obligation to respect requires the State to refrain from carrying out any practice, policy or legal measure that impinges on the integrity of individuals or groups without necessarily obligating it to take positive action to improve the situation of those who are currently not accessing water services. Such an approach corresponds with what Liebenberg has referred to as "negative constitutionalism" espoused in liberal constitutional theory.[77] The obligation to respect thus entails the State's duty to refrain from acts or omissions whose effect is to

[73] Part III of General Comment 15 (2002) provides for State obligations in respect of the right to water. It is noteworthy however that para 20 only provides for a tripartite typology of obligations, the obligations to respect, protect and fulfill. The obligation to promote is encapsulated under the obligation to fulfill in para 25.
[74] See CESCR *General Comment 15* (2002) para 10.
[75] Para 10.
[76] Para 10.
[77] Liebenberg *Socio-Economic Rights* 86.

interfere or deprive individuals or groups' enjoyment of their right to water.[78] In other words, the State is enjoined "to respect right-holders, their freedoms, autonomy, resources, and liberty of their actions."[79] The obligation to respect requires that States refrain from interfering directly or indirectly with the enjoyment of the right to water.

The African Commission adopted a similar approach in the *SERAC* case, stating that the duty to respect socio-economic rights obliges the State to respect the free use of resources owned or at the disposal of the individuals or groups.[80] The African Commission emphasised the importance of respecting resources belonging to collective groups as these communities use them to satisfy their needs.[81] The duty to respect is particularly significant for the purposes of safeguarding the resources of indigenous, nomadic and rural communities. These groups are mostly vulnerable and often live with the risk of being deprived of their land and traditional drinking water sources as will be demonstrated in the *Endorois* case to be discussed below.[82]

Another case in point is the Cochabamba water privatisation discussed in chapter 3 where the contract gave exclusive rights to all of the water in the Cochabamba valley to the water consortium.[83] Such a drastic measure was done without any consultation or participation of the indigenous people whose water sources essential for drinking water and irrigation were unilaterally appropriated.[84] This was a clear breach of the duty to respect the right to water of the indigenous people of Cochabamba. States should therefore refrain from engaging in any acts that deny or limit equal access to adequate water. Additionally, General Comment 15 makes it crystal clear that any unjustified interference with customary or traditional

[78] Craven *The International Covenant* 110. With regard to the State duty to refrain from interfering with right to water, see DM Chirwa "Water Privatisation and Socio-Economic Rights In South Africa" (2004) 4 *Law, Democracy and Development* 181 188-189; M Williams "Privatisation and the Human Right to Water: Challenges for the New Century" (2006-2007) 28 *Michigan Journal of International Law* 467 485-488; EB Bluemel "Implications of Formulating a Human Right to Water" (2004) 31 *Ecology Law Quarterly* 957 972-973; V Petrova "At the Frontiers of the Rush for Blue Gold: Water Privatisation and the Human Right to Water" (2006) 31 *Brooklyn Journal of International Law* 557 596-597. Screiber notes that as part of their duty to respect the right to water, States must abstain from any action, direct or indirect, that may lead to the infringement of an individual's access to water. See W Screiber "Realising the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations" (2008) 48 *National Resources Journal* 431 445.

[79] See *SERAC v Nigeria* para 46. See also Craven who also points out that in general terms, this obligation requires the State to refrain from acts which would serve to deprive individuals of their rights protected under the ICESCR. Craven *The International Covenant* 110.

[80] *SERAC v Nigeria* para 45.

[81] Para 45.

[82] See section 4 3 5 3 below for an analysis of the *Endorois* case.

[83] See section 3 5 4, chapter 3 for a discussion of the Cochabamba water privatisation project.

[84] See section 3 5 4, chapter 3.

arrangements for water allocation, for instance would be a violation of the right to water.[85]

The obligation to refrain from impairing access to a relevant socio-economic right is broad enough to include the adoption of policies that result in denial of access by poor communities to the right, rather than simply prohibiting interference with existing access to the right.[86] The obligation to respect requires abstention from water privatisation projects or full cost recovery measures that would undermine the possibility of individuals or communities gaining access to basic supplies of water for personal or domestic use.[87]

The CESCR in its General Comment 14 elaborated that a State may be in violation of its duty to respect human rights should it neglect to take into account its human rights obligations when entering into bilateral or multilateral agreements with other States, international organisations and other entities such as multinational corporations (hereinafter referred to as "MNCs").[88] As part of its obligation to respect, a State is enjoined to ensure that the advancement of the human right to water is a paramount objective that the privatisation of water services must achieve.[89] Such water privatisation agreements should be operationalised in such a way that eradicates inequality in access to water rather than entrench such inequity.[90] A State would therefore be in violation of its obligation to respect the right to water should it enter into a privatisation agreement that would favour one section of society over another,[91] increase water tariffs beyond what is affordable for the entire population[92]

---

[85] General Comment 15 lists other instances that amount to violations of the duty to respect such as "unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law." See CESCR *General Comment 15* (2002) para 21.

[86] Craven *The International Covenant* 110.

[87] Eide notes that this entails non-intervention by the State where individuals or groups can take care of their needs without weakening the possibility of others to do the same. See Eide "State Obligations" in *Governing Food Security* 115.

[88] See United Nations Committee on Economic, Social and Cultural Rights *General Comment No 14, The Right to the Highest Attainable Standard of Health* (2000) UN Doc E/C.12/2000/4 para 50. The CESCR has also emphasised the duty on States to refrain from implementing policies that affect the enjoyment of the rights protected in the ICESCR in light of the implementation of structural adjustment programmes of the World Bank and the International Monetary Fund by developing countries. For a discussion of the CESCR's various concluding observations on the issue, see Sepulveda *Obligations* 218-219.

[89] 233.

[90] Screiber 2008 *National Resources Journal* 431 445.

[91] See CESCR *General Comment 15* (2002) para 15.

[92] Para 12(c)(ii).

or takes unjustified retrogressive measures.[93] Water privatisation measures must comply with the normative framework imposed by the right to water to be human rights compliant. In this regard, chapter 6 of this dissertation proposes an accountability model incorporating good practices from different jurisdictions. In illustrating the good practices, chapter 6 also highlights and contrasts with the bad practices that are not compliant with the right to water and should be avoided.

The duty to respect the right to water requires the State to refrain from interfering with the enjoyment of the right, whether directly or in an indirect fashion.[94] This is particularly the case where privatisation results in the curtailment of individuals and groups' access to sufficient and safe water or makes the conditions of such access more onerous for such holders.[95] States are therefore enjoined, not only to desist from interfering with enjoyment of the right to water, but also to refrain from obstructing or hindering the right by adopting water privatisation policies that negatively impact on communities and individuals' enjoyment of the right.

In the Cochabamba privatisation discussed in chapter 3,[96] Law 2029 on Potable Water Services and Sanitary Sewerage[97] (hereinafter referred to as "Law 2029") allowed the possibility of charging traditional communities who drew water in the area covered by the concession agreement. It is pertinent to note that both Law 2029 and the concession agreement granted to the private operator, *Agua del Tunari,* exclusive use of water resources in the area covered by the privatisation agreement.[98] Significantly, the privatisation agreement conferred on *Agua del Tunari* the "right to obligate potential users to connect themselves to the systems of potable water and sewage of the concessionaire," thereby interfering with the water users' freedom of choice.[99] Furthermore, Law 2029 enjoined any persons who either owned or occupied buildings in the concession area to exclusively contract with and connect to water services provided by *Agua del Tunari*. The privatisation agreement further prohibited, six months after the privatisation agreement became operative, the use of any alternative water sources in the concession without the approval of *Agua del*

[93] Para 19.
[94] Para 21.
[95] Williams 2007 *Michigan Journal of International Law* 486.
[96] See section 3 5, chapter 3.
[97] Ley No 2029 Ley de Servicios de Agua Potable y Alcantarillado Sanitario (29 October 1999). Law 2029 provided the legal framework for the Cochabamba water privatisation agreement.
[98] M McFarland Sanchez-Moreno & T Higgins "No Recourse: Transnational Corporations and the Protection of ECOSOC Rights in Bolivia" (2004) 27 *Fordham International Law Journal* 1663 1767.
[99] 1767.

Tunari.[100] Most significantly, the privatisation agreement gave *Agua del Tunari* the right to install meters on private wells and charge the owners of wells for such installation.[101] In light of these provisions, users of water obtained from alternative water supply systems such as private wells would have been operating illegally had they neglected to get the approval of the private operator.[102] In areas that were not covered by the privatisation agreement, the communities were obliged by Law 2029 to obtain five-year, non-exclusive licenses for water provision.[103]

The above requirements brought about by the State's privatisation of the Cochabamba water supply system impacted negatively on the right to water of such indigenous communities living in Cochabamba. The conditions imposed as part of the privatisation arrangement affected their traditional uses and customs with regard to water allocation. Such interference with pre-existing access constituted a violation of the right to water, in particular the obligation to respect existing enjoyment of the right.[104] Sanchez-Moreno & Higgins point out, however, that if requiring indigenous communities to obtain their water supply through the concessionaire would mean improved access to safe water for them, the interference with customary arrangements would not have been arbitrary and without justification.[105] The CESCR has elaborated that:

> "If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant."[106]

It must however be noted that Law 2029 was passed with little debate and consultation despite its interference with the right to water. The right of the community to participate in the decision-making processes like privatisation of water must be an integral part of such a policy.[107]

Sanchez-Moreno and Higgins have pointed that the central problem in the process of privatisation of Cochabamba's water system and a major cause of the so-

[100] 1767.
[101] 1767.
[102] 1767.
[103] 1779.
[104] 1779.
[105] 1779.
[106] See UN Committee on Economic, Social and Cultural Rights *The Nature of States Parties' Obligations* (1990) para 19.
[107] CESCR *General Comment 15* (2002) para 48.

called "water war" was the lack of transparency and public consultation and participation in the decision-making process.[108] The effect of lack of public consultation and participation meant that the Cochabamba community was not availed an opportunity to challenge the proposed privatisation or present alternative proposals. The lack of public consultation and participation and the resulting interference with pre-existing access to water amounted to a violation of the duty to respect the right to water. Sanchez-Moreno and Higgins have argued that consultation with stakeholders during the negotiation process might have led to substantive changes in the contract thereby forestalling any ensuing problems.[109] General Comment 15 emphasises the importance of public participation in decision-making about water, and public access to information concerning water services. The CESCR's view in General Comment 15 is that:

> "the right of individuals and groups to participate in decision-making processes, that may affect their exercise of the right to water, must be an integral part of any policy, programme or strategy concerning water."[110]

Although the CESCR has defined its understanding of the tripartite typology of State duties and applied it in its general comments such as the General Comment 15 on the right to water, the CESCR does not use the language of respect, protect, promote and fulfill with great frequency in its concluding observations on State reports. The UN Special Rapporteur on the issue of human rights obligations related to access to safe drinking water and sanitation (hereinafter referred to as the "Special Rapporteur") has also adopted the typologies approach in her recent report on the human rights obligations and responsibilities which apply in cases of non-State service provision of water and sanitation.[111]

The Special Rapporteur has emphasised that the human rights obligations imposed on States by the right to water include the obligations to respect, to protect and to fulfill the right. In line with the approach of the CESCR in General Comment 15, the Special Rapporteur further elaborated the obligation to respect as requiring

[108] McFarland Sanchez-Moreno & Higgins 2004 *Fordham International Law Journal* 1781.
[109] 1781.
[110] CESCR *General Comment 15* (2002) para 48.
[111] See United Nations Human Rights Council *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe drinking Water and Sanitation, Catarina de Albuquerque* (2010) UN Doc A/HRC/15/31.

States to refrain from interfering with existing access to water services.[112] Such an approach is similar to an earlier position adopted by the UN High Commissioner for Human Rights on a study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments (hereinafter referred to as the "UN High Commissioner Report").[113] The UN High Commissioner Report explained this obligation as entailing prohibition against any practice or activity that denies or limits access to safe drinking water, or that pollutes water.[114] Additionally, this obligation means that States must also guarantee that individuals have access to effective judicial or other appropriate remedies providing adequate reparation, including restitution, compensation, satisfaction or guarantee of non-repetition.[115]

In its Concluding Observations on Mexico, the CESCR emphasised the obligation on the State to respect the socio-economic rights of indigenous and local communities whose livelihood was threatened by the construction of the *La Parota* dam.[116] The CESCR was concerned that the construction of the *La Parota* dam would cause the flooding of 17,000 hectares of land inhabited or cultivated by indigenous and local farming communities leading to environmental degradation and massive displacements. Most importantly, such a massive dam project would violate the communal land rights of the affected communities, as well as their economic, social and cultural rights such as the right of access to water.[117] The CESCR therefore recommended that the State ensure that indigenous and local communities affected by the *La Parota* hydroelectric dam project were duly consulted, and their prior informed consent sought before making any decision that directly or indirectly affect their rights.[118] The following section discusses the obligation imposed on the State by the obligation to protect.

---

[112] Para 19.
[113] *United Nations High Commissioner for Human Rights Report on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation under International Human Rights Instruments* (2007) UN Doc A/HRC/6/3 .
[114] Para 36.
[115] UN High Commissioner Report para 36.
[116] United Nations Committee on Economic, Social and Cultural Rights *Concluding Observations on Mexico* (2006) UN Doc E/C.12/MEX/CO/4.
[117] Para 10.
[118] Para 28.

4 2 2 Obligation to protect

While the duty to respect the right to water is about the imposition of limitations on the State's freedom of action, requiring it to abstain from deprivation of rights, the duty to protect enjoins the State to act positively to regulate, prevent and remedy interferences by non-State actors.[119] In such a case, the State must "regulate private interactions" to ensure that individuals are not arbitrarily deprived of the enjoyment of their right to water by other private individuals and groups.[120]

In contrast to the obligation to respect, the obligation to protect imposes a positive obligation on the State to adopt laws, policies and regulations to protect beneficiaries of the right to water from interference by non-State actors.[121] The State is enjoined to ensure that remedies are available to victims of violations of the right to water and to penalise perpetrators for any interference with the right which amounts to a violation. In *SERAC*, the African Commission explained that the duty to protect beneficiaries of human rights imposes on the State an obligation to adopt the necessary legislation and provision of appropriate remedies in the case of violation.[122] The CESCR has emphasised the State's obligation to protect individuals and group interests against third party interferences.[123] The obligation to protect requires State parties to prevent third parties from interfering with the enjoyment of the right to water.[124] The State is thus obliged to adopt the necessary measures to prevent third parties from interfering with or denying equal access to adequate water.

The duty to protect is a clear recognition that the responsibility of the State goes beyond its own actions or that of its agents, to positive protection of the

---

[119] See AM Gross "The Right to Health in an Era of Privatisation and Globalisation: National and International Perspectives" in D Barak-Erez & AM Gross (eds) *Exploring Social Rights: Between Theory and Practice* 289 303. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights enshrine a similar approach providing that, in the interpretation of economic, social and cultural rights, the State has a duty to ensure that private providers over which they exercise jurisdiction do not deprive individuals of their economic, social and cultural rights. The Maastricht Guidelines further provide for the responsibility of States for any violations of economic, social and cultural rights that result from their neglect to exercise the necessary control on the behaviour of such non-State actors. See "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 691 698.

[120] Craven *The International Covenant* 112.

[121] The African Commission has also pointed out that this duty to protect entails "the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms." See *SERAC* v *Nigeria* para 46.

[122] *SERAC v Nigeria* para 46.

[123] Craven *The International Covenant* 112.

[124] CESCR *General Comment 15 (2002)* para 22.

individual from third party violation.[125] Such measures may be in the form of legislation, policies and judicial decisions.[126] The right to water thus imposes a duty on the State to prevent third parties from polluting water resources. It also requires that States prevent third parties from extracting water resources in an unsustainable manner. The State's obligation to protect assumes a greater importance due to the increased recourse to water services privatisation discussed in chapter 3. The State is enjoined to ensure that the non-State providers of water services comply with the standards imposed by the right to water despite privatisation of water services.[127]

The Special Rapporteur has explained that there is a shift to a stronger focus on the obligation of the State to protect where non-State actors are involved in service provision.[128] The UN High Commissioner's report has also explained that this obligation includes the adoption of necessary and effective legislative and other measures to prevent third parties from denying access to safe drinking water. This obligation entails the State's duty to regulate and control non-State actors so that they do not compromise equal, affordable and physical access to safe water.[129] The Special Rapporteur further notes that despite the involvement of non-State actors, the State has an obligation to develop a comprehensive plan of action which incorporates short, medium and long-term strategies aimed at the realisation of the right to water.[130] The obligation to fulfil, according to the Special Rapporteur, requires the State to adopt the necessary measures to enable and assist individuals to enjoy their human right to water.[131]

The duty to protect further requires the State to extend special protection to vulnerable and disadvantaged groups. In its General Comment 5 on persons with disabilities, the CESCR alluded to the heightened duty of the State to protect the disabled, particularly in light of the current trend towards privatisation of services hitherto publicly provided. The CESCR pointed that:

> "In a context in which arrangements for the provision of public services are increasingly being privatised and in which the free market is being relied on to an

[125] Craven *The International Covenant* 112.
[126] Such third parties include individuals, groups, corporations (including private non-State actors operating water supply services) and other entities as well as other agents acting under State authority. See CESCR *General Comment 15 (2002)* para 22.
[127] Williams 2007 *Michigan Journal of International Law* 486.
[128] See Special Rapportuer report para 21.
[129] UN High Commissioner report para 38.
[130] Para 21.
[131] Para 19.

> ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities."[132]

4 2 2 1 The duty to protect in the context of the privatisation of water services

The State has an obligation to prevent third parties from threatening access to equal, affordable, sufficient, safe and acceptable water.[133] Kok has pointed that where water services are operated by private operators, the State has a duty to effectively regulate such entities to ensure that they do not interfere with the right to water.[134] The CESCR has also explained that:

> "Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water."[135]

The above approach reinforces the point that privatisation of water services does not relieve the State of its legal responsibility under international human rights law.[136] The duty to protect means that the State must prevent violations by third parties. In other words, should a particular privatisation scheme lead to a situation where various components of the right to water are infringed, the State may be held liable where it neglected to put in place mechanisms to prevent and redress violations by third parties.[137] It necessarily follows that States do not relinquish their domestic nor international human rights obligations by privatising the delivery of water services. A State should ensure that it continues to exercise adequate oversight in order to meet its obligation to realise the right to water when it engages non-State actors to manage its water services. Should a water privatisation scheme result in the violation

---

[132] United Nations Committee on Economic, Social and Cultural Rights *General Comment No 5, Persons with Disabilities* (1994) UN Doc E/1995/22 para 11.
[133] CESCR *General Comment No 15* (2002) para 24.
[134] See A Kok "Privatisation and the Right of Access to Water" in K De Feyter & FG Isa *Privatisation and Human Rights in the Age of Globalisation* (2005) 259 268.
[135] See CESCR *General Comment 15 (2002)* para 24.
[136] W Vandenhole & T Wilders "Water as a Human Right-Water as an Essential Service: Does it Matter?" (2008) 26 *Netherlands Quarterly of Human Rights* 391 409-410.
[137] Kok "Privatisation" in *Privatisation and Human Rights* 268.

of any of the constituent elements of the right to water discussed in chapter 2,[138] the State may be liable for failing to discharge its duty to protect.[139]

4 2 2 2 Duty to monitor and regulate as part of the obligation to protect

International human rights instruments have iterated the duty of States to monitor and regulate the realisation of socio-economic rights as part of their protective mandate.[140] This monitoring obligation arguably becomes more important where water services have been privatised. A State would be in violation of the duty to protect where lack of adequate monitoring and regulatory mechanisms in respect of a non-State actor involved in the provision and management of water services results in the breach of minimum international human rights guarantees relating to the right to water.[141]

One of the key issues raised in the cases of water privatisation in Tanzania, Bolivia, The Philippines and South Africa discussed in chapter 3 was the paucity of effective monitoring and regulatory mechanisms to exercise oversight over the private providers. In The Philippines, a study of the Manila water privatisation concluded that it was mainly the erroneous design of the privatisation process and the lack of political will to create a powerful regulatory agency that led to the partial failure of that privatisation scheme.[142] In South Africa, the local authority in Nelspruit did not have the capacity to effectively regulate the water concession contract hence its failure and, in some cases, officials mandated to monitor and regulate the privatisation contracts lacked the requisite expertise to do so.[143] In the Dar es Salaam water privatisation, the absence of a regulatory and monitoring body meant there was no independent authority to formulate and monitor tariff levels.[144] The duty

[138] See section 2 6 of chapter 2 above.
[139] Kok "Privatisation" in *Privatisation and Human Rights* 268.
[140] See CESCR *General Comment 12* (1999) para 19; CESCR *General Comment 15* (2002) paras 24, 42, 44(b)(ii), 50(e)& 52 and the Maastricht Guidelines. Para 15(d) of the latter provides that violations of economic, social, cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations such as the failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights. See also A Eide *The Right to Adequate Food* UN Doc E/CN.4/Sub.2/1987/231987 (1987) para 68 where he pointed out that the duty to protect requires the State to take measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other rights of the individual.
[141] Kok "Privatisation" in *Privatisation and Human Rights* 268.
[142] See 3 5 3, chapter 3.
[143] See 3 5 2, chapter 3.
[144] See section 3 5 1 of chapter 3 above.

to regulate and monitor enjoins the State to take appropriate positive action to protect beneficiaries of rights from the potentially deleterious acts of private actors.[145]

In its Concluding Observations on Panama,[146] the CESCR emphasised the State's obligation to protect indigenous people from abuse of their rights by third parties, including the right of access to water. The CESCR expressed concern that the land rights of indigenous peoples were being threatened by mining and cattle ranching activities undertaken with the approval of the State. This resulted in the displacement of indigenous peoples from their traditional ancestral and agricultural lands and abuse of other socio-economic rights such as access to water.[147] A State can only fulfill the duty to protect through the establishment of an effective monitoring and regulatory system to exercise oversight over such non-State actors involved in the provision of water services.[148]

Safeguards to prevent arbitrary disconnections and unaffordable water tariffs are very important for the protection of the human right to water in the event of involvement of non-State actors in the provision of water services. These independent monitoring mechanisms should ensure that the minimum international standards with regard to the right to water are maintained. The regulatory and monitoring mechanisms should have the mandate to scrutinise privatisation contracts to ensure their provisions and implementation do not encroach on the right to water. At the very least, they should mandate private or public operators of water services to meet the minimum quantitative or qualitative levels of water provision as provided in General Comment 15.[149] The monitoring mechanisms should put in place strict water tariff control measures to prevent private water operators from charging exorbitant water tariffs thereby impeding the economic accessibility of water.[150] It is also important that water services should be protected from disconnections where a beneficiary is unable to pay for the service. Kok has suggested that a water supplier should only be allowed to adopt measures necessary to limit an indigent beneficiary's supply to the minimum levels provided for under international law rather than completely disconnecting the water supply. If the national minimum standards are

[145] Chirwa 2004 *African Human Rights Law Journal* 235.
[146] United Nations Committee on Economic, Social and Cultural Rights *Concluding Observations on Panama* (2001) UN Doc E/C.12/1/Add.64.
[147] Para 12.
[148] CESCR *General Comment 15 (2002*) para 24.
[149] Kok "Privatisation" in *Privatisation and Human Rights* 271.
[150] 286.

higher than the international minimum standards, then the water supplier should limit the supply to a defaulting user to the minimum national standard.[151]

The State's duty to put in place an effective monitoring and regulatory mechanism is particularly important in the case of discontinuation of water services for non-payment. Arbitrary disconnection of water services for non-payment is a pervasive practice, especially in instances where water services have been privatised or corporatised as borne out by the discussions on water privatisation in Tanzania, Bolivia, The Philippines and South Africa explored in chapter 3.[152] The State is under an obligation, as part of its duty to protect, to ensure that the procedure for discontinuation of water services is fair and equitable. Most fundamentally, such a procedure must protect the poor from disconnections of access to basic water services.[153] It means that States have an obligation to ensure access to water and water facilities to those who lack sufficient financial means by adopting appropriate pricing policies such as free or low cost water.[154] The South African Water Services Act 108 of 1997 (hereinafter referred to as the "Water Services Act") represents a commendable legislative measure for discharging this duty by the State.[155]

4 2 3 Obligation to fulfil

The obligation to fulfill the right to water requires the State to adopt appropriate legislative, administrative, judicial and other measures towards the full realisation of the right to water.[156] The obligation to fulfill is key to the realisation of socio-economic rights. Craven pointed out that the obligation to fulfill is the principal concept around which article 2(1) of the ICESCR was built on.[157] The obligation to fulfill imposed by the right to water entails the direct provision of water and water services in the event that individuals and groups lack the means to access these facilities by themselves.

---

[151] 286-287.

[152] See chapter 3, section 3 5 for privatisation initiatives in Tanzania, Bolivia, The Philippines and South Africa.

[153] See Chirwa 2004 *African Human Rights Law Journal* 237.

[154] See CESCR *General Comment 15* (2002) paras 15 & 27.

[155] It must be noted though that in the *Mazibuko* case, the Constitutional Court ruled that these procedural safeguards were not available in respect of pre-paid water meters. For a full discussion see section 4 5 1 3 below.

[156] See De Schutter *International Human Rights Law* 461.

[157] Article 2 states that:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

The CESCR has disaggregated the obligation to fulfill the right to water into the duties to facilitate, promote and provide.[158] The duty to facilitate enjoins the State to take positive measures to assist individuals and communities to enjoy the right.[159] The CESCR in its Concluding Observations on States' Parties reports has referred to the obligation to facilitate in broad terms, mainly indicating the necessity to overcome obstacles to the enjoyment of the right to water.[160] This requires the State to proactively engage in measures geared towards strengthening individuals and groups' access to and utilisation of resources and means to access water and water services.[161] A State must be accorded the requisite margin of appreciation to adopt the necessary measures to facilitate the realisation of the right to water within its territory, given its unique circumstances.

The Special Rapporteur, in the same vein as the CESCR, points out that the ultimate aim is the full realisation of the right to water. UN High Commissioner's report notes that this obligation requires the State to adopt the necessary measures - legislative, administrative, policies, programmes and others - to facilitate and promote universal access to safe water.[162] Both reports have adopted the approach of the CESCR in General Comment 15 to disaggregate the obligation to fulfill into the obligations to facilitate, promote and provide.[163] Resources constraints will mean that the right may have to be fulfiled on a progressive basis.[164] The Special Rapporteur echoes the approach of the CESCR, pointing out that States are required to devote their maximum available resources and move as expeditiously and effectively as possible towards full realisation of the right to water. [165]

---

[158] See CESCR *General Comment 15* (2002) para 25.
[159] Para 25.
[160] See United Nations Committee on Economic, Social and Cultural Rights *Concluding Observations Peru* (1998) E/1998/22 para 141.
[161] Sepulveda *Obligations* 201.
[162] UN Human Rights Commissioner report para 40.
[163] The UN High Commissioner's report explains the obligation to facilitate as requiring States to take positive measures to assist individuals to access safe water. The obligation to promote obliges the State to take steps to ensure that there is appropriate education about hygiene, notably concerning hygienic use of water and the protection of water. The obligation to provide enjoins States to ensure access to safe water for individuals when they are unable, for reasons beyond their control, to do so themselves and through the means at their disposal. See UN Human Rights Commissioner report Para 41.
[164] Para 19.
[165] Para 19.

The CESCR has emphasised this obligation in its Concluding Observations on Serbia.[166] The CESCR expressed its concern at the high number of Roma families that lived in sub-standard informal settlements without access to basic services such as electricity, running water, sewage facilities, medical care and schools.[167] The CESCR pointed to the discrepancy in access to water, noting that 17.5 percent of rural households in Serbia do not have direct access to safe water, and for the few that do enjoy such access, the water is of the poorest quality.[168] The CESCR recommended that the State ensure that the Roma have access to safe drinking water and other essential services. The CESCR emphasised Serbia's "obligation to ensure access to safe drinking water within, or in the immediate vicinity, of each household."[169]

Furthermore, States are obliged to adopt national water strategies and plans of action to realise the right to water as part of the obligation to fulfil.[170] Where there is a lack of physical access to water resources within reasonable distances, the State is enjoined to ensure that water is physically accessible.[171] The duty to fulfill should also be interpreted to require the State to accord the minimum amount of free water to those who lack the resources to pay for their water needs for personal and domestic uses.[172] Denial of a basic water supply not only poses a serious health risk, but also deprives the victims of their inherent dignity. It strips individuals and groups of the possibility of living a dignified life.[173] To achieve this objective, the State is enjoined to adopt intervention measures such as the use of a range of appropriate low-cost technologies and pricing policies such as free or low-cost water and income supplements,[174] subsidies, cross subsidies and other related measures in favour of disadvantaged groups.[175] South Africa provides an interesting legislative framework

[166] See United Nations Committee on Economic, Social and Cultural Rights *Concluding Observations on Serbia* (2005) UN Doc E/C.12/1/Add.108.
[167] Para 31.
[168] Para 32.
[169] Para 60.
[170] Para 26.
[171] Para 12(c)(i).
[172] Para 12(c)(ii). See also para 27 where the CESCR has commented: "Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households."
[173] JD Visser, E Cottle & J Mettler "Realising the Right of Access to Water: Pipe Dream or Watershed" (2003) 7 *Law, Democracy and Development* 27 48.
[174] CESCR *General Comment 15 (2002)* para 27.
[175] See Chirwa 2004 *African Human Rights Law Journal* 241.

in this regard which provides for the provision of a free basic water supply although the sufficiency of the free basic water supply was challenged in the *Mazibuko* case.[176] This and other good practices towards the realisation of the right to water are explored in chapter 6.

The obligation to fulfill is the most contentious and difficult to implement of all the obligations imposed by socio-economic rights as illustrated by the *Mazibuko* case in the context of the right to water. The difficulty emanates from the fact that it is often difficult to articulate a clear violation of the obligation to fulfill as that duty involves the judiciary evaluating the substantive adequacy of government programmes.[177] Such a process involves difficult issues such as resource allocation, non-legal technical expertise, capacity building and inter-disciplinary cooperation.[178] Nevertheless, the obligation to fulfill is important for the realisation of the right to water. This layer of duty mandates the State to proactively engage in a course of action designed to strengthen access to safe and sufficient water. The following section discusses the fourth layer of State duties imposed by the right to water, the obligation to promote.

4 2 4 Obligation to promote

In the context of the right of access to sufficient water, the State's duty to promote entails the adoption of educational and informational programmes designed to enhance awareness and understanding of the right of access to sufficient water.[179] The CESCR has pointed out that the proper exercise and respect for human rights can only take place in a situation where there is sufficient awareness of those rights by both the bureaucrats and individuals.[180] The obligation to promote imposes a duty on the State to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and the sustainable use of water.[181] The State is also obliged to take steps to ensure that there is appropriate education and public awareness concerning access to water programmes particularly in rural and deprived urban areas, informal settlements, or amongst indigenous peoples and other disadvantaged minorities.

---

[176] The *Mazibuko* case is analysed in section 4 5 1 3 below.
[177] R Pejan "The Right to Water: The Road to Justiciability" (2004) 36 *The George Washington International Law Review* 1181 1186.
[178] 1186.
[179] See Kok "Privatisation" in *Privatisation and Human Rights* 281.
[180] See Committee on Economic, Social and Cultural Rights *Human Rights Education and Public Information Activities Relating to the ICESCR* (1996) UN Doc E/1996/22,Chapter IV para 324.
[181] CESCR *General Comment 15 (2002)* para 25.

A key component of this State obligation is the State's duty to provide individuals and groups the concomitant right to seek, receive and distribute information concerning water issues.[182] The right to information in relation to water issues is one of the most significant aspects of the right to water. Access to information is fundamental to the right of people to participate effectively in decision-making processes on water policies, programmes and actions.[183] Access to information and participation by individuals and groups in water policies is particularly important in instances of the privatisation of water services. This is aptly illustrated in the Cochabamba case where there was a conspicuous lack of transparency and public participation in the decision making process leading to the privatisation of water.[184] This constituted a violation of procedural safeguards such as public consultation and participation which was a breach of the State's duty to promote the right to water. Provision of adequate, timely and relevant information and meaningful consultation with all the stakeholders before and during the privatisation process may possibly have led to substantive changes in the contract to accommodate their concerns.[185]

4 3 Use of typologies in select international and regional instruments

4 3 1 The International Convention on the Elimination of All forms of Discrimination Against Women

The CEDAW imposes a number of different obligations on States. These include substantive obligations relating to the prohibition of discrimination as well as procedural obligations, mainly of a reporting nature. Substantive obligations can also be classified between those subject to immediate realisation and those subject to progressive realisation.[186] The State obligations contained in the CEDAW are expressed in a variety of forms, and the relevance of the typologies analysis ultimately depends on the wording of the individual provisions of the treaty. What is clear is that many of the provisions of CEDAW are in fact specific instances of the

[182] Para 12(c)(iv).
[183] See Pejan 2004 *The George Washington International Law Review* 1186.
[184] See section 3 5 4 of chapter 3.
[185] Pejan 2004 *The George Washington International Law Review* 1783.
[186] For a discussion of the different types of obligations imposed by the CEDAW, see A Byrnes & J Connors "Enforcing the Human Rights of Women: A Complaints Procedure for the Convention on the Elimination of All Forms of Discrimination Against Women?" (1992) 21 *Brooklyn Journal of International Law* 679 707-734.

various levels the State duty to ensure equality and non-discrimination.[187] The Committee on the Elimination of All forms of Discrimination (hereinafter the "CEDAW Committee") has expressly adopted the typologies approach in its analysis of State obligations imposed by CEDAW.[188]

Article 2 of CEDAW obliges States to prohibit discriminatory behaviour and to take appropriate measures to ensure the full development and advancement of women in their enjoyment of human rights. Article 3 of CEDAW requires States to take "all appropriate measures, including legislation" to guarantee women's enjoyment of human rights on an equal basis with men."[189] In addition, article 4 provides for the State's adoption of special measures aimed at accelerating equality and such measures should not be regarded as discrimination.[190] The three main categories of obligations imposed by CEDAW on States include the obligations to "ensure/accord/grant the right,"[191] obligation "to undertake"[192] and "obligation to take all appropriate measures in order to ensure" rights guaranteed under that treaty.[193] Additionally, the CEDAW Committee has pointed out that article 2 obliges States "to respect, protect and fulfill women's right to non-discrimination and to the enjoyment of equality" thereby expressly adopting the typologies approach discussed above.[194]

The CEDAW explicitly refers to the right to water for rural women. It obliges States to cater for the specific needs of rural women and to ensure them the right to enjoy adequate living conditions, particularly in relation to access to water.[195] This provision is also augmented by article 24 which enjoins States parties to adopt

---

[187] See A Byrnes, MH Graterol & R Chartes "State Obligation and the Convention on the Elimination of All Forms of Discrimination Against Women" (2007) 48 *University of New South Wales Faculty of Law Research Series*1 28-29.

[188] See United Nations Committee on the Elimination of Discrimination Against Women *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* (2010) UN Doc CEDAW/C/2010/47/GC.2.

[189] CEDAW, article 3.

[190] See United Nations Committee on the Elimination of Discrimination Against Women *General Recommendation 5* (1988) UN Doc A/43/38.

[191] See articles 2, 3, 4, 7, 9(1), 15(1), 16(1).These provisions oblige the State to take immediate and concrete action, in particular to introduce any necessary legislative changes.

[192] Most of these are contained in article 2 of CEDAW.

[193] There are various formulations of this provision, see articles 3,6,10,11 and 24 of CEDAW.

[194] Para 9.

[195] Article 14(2)(h) of CEDAW provides:

> States parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right...[to]enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication.

necessary measures at the national level aimed at achieving the full realisation of the rights recognised in CEDAW. These obligations, it is argued, are analogous to the obligation to fulfill discussed above.[196] This means that the State is enjoined to adopt appropriate legislative, administrative, judicial and other measures geared towards the full realisation of the right to water for women. This entails the direct provision of water and water services to those women who lack the means to access these facilities by themselves. The State must proactively adopt temporary special measures as envisaged in article 4 of CEDAW aimed at strengthening vulnerable and indigent women's access to and utilisation of resources and means to access water and water services.[197] It is significant to point out that, in spite of privatisation of water services, the duty to fulfill should be interpreted to enjoin the State to accord the minimum amount of free water to those women who lack the resources to pay for their water needs for personal and domestic uses.[198]

Article 2(e) of the CEDAW entrenches the State's obligation to protect women against violation of their rights by third parties. This provision is similar to the obligation to protect discussed above. Article 2(e) requires States to adopt "appropriate measures to eliminate discrimination against women by any person, organisation or enterprise." Under this provision, a State party can, in addition to being responsible for the acts or omissions of its own agents or officials, be held legally accountable for its failure to act with due diligence to prevent, investigate, punish and remedy private acts of discrimination.[199]

States are legally responsible for the failure to prevent, investigate and remedy such acts of discrimination whether such acts of private individuals take place in the domestic or public sphere.[200] This duty is particularly significant in the context of privatisation of water services. This duty means that the State is obliged to prevent third parties from threatening women's access to equal, affordable, sufficient, safe and acceptable water. A State should ensure that it continues to exercise

---

[196] See para 4 2 3.
[197] Sepulveda *Obligations* 201.
[198] Para 12(c)(ii). See also para 27 where the CESCR has stated that:

> "[a]ny payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households."

[199] United Nations Committee on the Elimination of Discrimination Against Women General Recommendation No 19 on Violence Against Women (1992) UN Doc A/47/38 paras 8-9.
[200] See S Cusack & RJ Cook "Combating Discrimination based on Sex and Gender" in C Krause & M Scheinin *International Protection of Human Rights* (2009) 205 209.

adequate oversight in order to meet its obligation to realise the right to water when it engages non-State actors to manage its water services. Should a water privatisation scheme result in the violation of any of the constituent elements of a right to water, the State may be liable for failing to discharge its duty to protect.[201]

Article 2 of CEDAW contains States parties' general undertaking to eliminate discrimination against women through the adoption of constitutional, legislative, administrative and other measures. A crucial component of the right to water is that everybody must be ensured access to water without discrimination, including the most vulnerable or marginalised groups. The principle of non-discrimination, which is a fundamental human right in itself and is included in all international human rights conventions, prohibits discrimination based on listed and analogous grounds. Significantly, article 2 can be interpreted as enjoining the State to eliminate discriminatory practices in access to water, both in law and in fact, on the basis of a person's defined characteristics such as sex.

Non-discrimination entails more than mere prohibition of direct and indirect discrimination against women's access to water and water services. It includes proactive measures to ensure that vulnerable or marginalised groups such as women have access to safe water. The State is obliged to allocate resources and adopt policies that benefit a wide section of the population, rather than focusing on expensive facilities that benefit only a privileged few. Notwithstanding privatisation of water services, States should provide special attention to groups that are subject to historical patterns of discrimination such as women. This later approach is borne out by article 3 of CEDAW that requires States to take appropriate measures geared towards guaranteeing women's enjoyment of rights on an equal basis with men.[202] The CEDAW Committee has elaborated the obligation to respect human rights as requiring States to refrain from making laws, policies, regulations and programmes that result in the denial of equal enjoyment by women of their civil, political, economic, social and cultural rights.[203]

The obligation to protect, as explained above, enjoins the State to protect women against discrimination by private actors. States are obliged to take steps aimed at eliminating customary and all other practices that prejudice and perpetuate

[201] 268.
[202] CEDAW, article 3.
[203] CEDAW Committee *General Recommendation No 19* (1992) para 9.

the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women.[204] Article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties. Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases a private actor's acts or omissions may be attributed to the State under international law.[205] States parties are thus obliged to ensure that private actors do not engage in discrimination against women. The appropriate measures States parties are obliged to take include the regulation of the activities of private actors in regard to education, employment and health policies and practices, working conditions and work standards, and other areas where private actors provide services such as banking, housing and water provision.[206]

The CEDAW Committee has further interpreted the obligation to fulfill as enjoining States to take a wide variety of steps to ensure that women and men enjoy equal rights in law and in fact including, where appropriate, the adoption of temporary special measures. Accordingly, States should fulfill their legal obligations to all women through designing public policies, programmes and institutional frameworks that are aimed at fulfilling the specific needs of women leading to the full development of their potential on an equal basis with men.[207] The obligation to fulfill encompasses the obligation of States to facilitate access to and provide for the full realisation of women's rights.

In the case of *AT v Hungary*[208] the complainant alleged failure by the State to protect the applicant from being subjected to regular and severe domestic violence and serious threats by her common law husband. Although not directly addressing the right to water *per se*, the views of the CEDAW Committee clearly show its adoption of the typologies approach to its interpretation of State obligations imposed by the CEDAW. The CEDAW Committee ordered the State to "respect, protect, promote and fulfill women's human rights, including their right to be free from all forms of domestic violence."[209]

---

[204] Para 9.
[205] See generally *Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No 4* (1988).
[206] Para 13.
[207] Para 9.
[208] *AT v Hungary*, Communication no 2/2003 of 26 January 2005.
[209] See *AT v Hungary* para 9.6(II)(a) & (b).

The above discussion clearly shows that the CEDAW Committee has explicitly adopted the typologies approach as an interpretive framework to elucidate the obligations imposed on States by CEDAW. This is also further reflected by the case of *AT v Hungary* in which the CEDAW Committee expressly ordered the State to respect, protect, promote and fulfill women's human rights. Utilising the typologies approach in such manner may provide guidance on the measures required to give effect to the specific obligations imposed by the various provisions of CEDAW, such as the right to water.

4 3 2 International Convention on the Elimination of Racial Discrimination

The International Convention on the Elimination of Racial Discrimination (hereinafter referred to as "ICERD")[210] obliges States to prohibit discrimination of any kind and ensure everyone equality before the law. Article 5 of ICERD enjoins States to uphold rights to housing, health, culture, education and social services without discrimination. The right to water, apart from being a social service, is also encapsulated under the rights to health and housing as discussed in chapter 2.[211] The Committee on the Elimination of Racial Discrimination (hereinafter referred to as "CERD"), the treaty body mandated to monitor State compliance with the ICERD, has stated that article 5 "implies the existence and recognition of civil and political, social and economic rights" and that "full respect for human rights is the necessary framework for the efficiency of measures adopted to combat racial discrimination."[212] The ICERD further obliges States to ensure everyone within their jurisdiction effective protection and remedies against any acts of racial discrimination.[213]

The CERD has not consistently used the "respect, protect, promote and fulfil" typology in its general recommendations and concluding observations on State reports.[214] Nevertheless, an examination of some general recommendations and concluding observations adopted by CERD shows that the typologies as used and

---

[210] See International Convention on the Elimination of Racial Discrimination 660 UNTS 195 (1969) (hereinafter ICERD). For a discussion on the jurisprudence of the Committee on the Elimination of Racial Discrimination, see N Prouvez "Confronting Racial Discrimination and Inequality in the Enjoyment of Economic, Social and Cultural Rights" in M Langford (ed) S*ocial Rights Jurisprudence: Emerging Trends in International Law and Comparative Law* 517-539.

[211] See section 2 5 2 4.

[212] See United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations on Malawi* (2003) UN Doc A/58/18 para 557.

[213] ICERD, article 6.

[214] See Sepulveda *Obligations* 157-248 for a comprehensive analysis of the use typologies of State duties by the CESCR.

developed by the CESCR also underpin the views of CERD on State reports. This section seeks to show the framework of analysis deployed by CERD in its analysis of State obligations under the ICERD and the relevance of such a framework for the right to water. The section does not intend to be a comprehensive analysis of the ICERD nor the concluding observations and general recommendations adopted by the CERD as that is beyond the scope of this study. A review however will be carried out on all aspects that are relevant to non-discrimination in the realisation of the right to water.

The CERD has elaborated the duty to respect in a similar fashion as used by the CESCR. In its General Recommendation 27, for instance, the CERD stressed States' duty to refrain from placing the Roma in camps outside populated areas that are isolated and without access to healthcare and other facilities such as clean water.[215] The CERD underscored the State's duty to respect rights, although within the context of eviction. As discussed above, this duty is applicable with respect to the right of access to water. The CERD committee, concerned about eviction or threat of eviction reportedly faced by most vulnerable groups, underscored States' duty to devise measures to prevent evictions or mitigate their negative effects.[216] Similarly, in its General Recommendation 27, the CERD committee enjoined States to proscribe any measures denying residence to and unlawful expulsion of the Roma.[217]

In its Concluding Observations on Australia, the CERD emphasised the duty to respect, obliging the State to refrain from adopting measures that withdraw existing guarantees of indigenous rights. The State was further obliged to make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their right to land.[218] Access to land has implications for access to water, particularly as it relates to indigenous populations. The duty to respect indigenous people's access to land is thus very important.

In its General Recommendation 30,[219] the CERD has emphasised the need for States to respect the right of non-citizens to an adequate standard of physical and

[215]United Nations Committee on the Elimination of Racial Discrimination *General Recommendation 27 on Discrimination Against the Roma* (2000) UN Doc A/55/18, annex V para 31.
[216] United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations of CERD on the Czech Republic* (2005) UN Doc A/58/18 para 385.
[217] CERD *General Recommendation 27* (2000) para 31.
[218] United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations on Australia* (2005) UN Doc A/60/18 para 36.
[219] United Nations Committee on the Elimination of Racial Discrimination *General Recommendation No 30 on Discrimination against Non-citizens* (2004) UN Doc CERD/C/64/Misc.11/rev.3.

mental health. In this regard, the CERD requires States to refrain from denying or limiting such group's access to preventive, curative and palliative health services.[220] Access to safe water as such is an underlying determinant for the right to health as highlighted in chapter 2 where I discussed the legal basis of the right to water.[221] While article 1(1) of the ICERD defines racial discrimination in terms of discriminatory acts performed in the public sphere, article 2(1)(d) requires States parties to bring to an end racial discrimination by any persons or group. This reflects the State's duty to protect against violation of rights by non-State actors, in a similar sense as used by the CESCR. The State's duty to protect is extremely vital to the extent that private institutions influence the exercise of rights or the availability of opportunities such as access to water. States parties must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination. The South African context, for instance, demonstrates the importance of eliminating racial discrimination in the provision of water services. Impoverished black communities such as the Phiri community discussed in chapter 3 still experience disproportionately worse access in the quantity and quality of water.[222]

Some States have argued that the prohibition and punishment of purely private conduct lies beyond the scope of government regulation, even in situations where personal freedom is exercised in a discriminatory manner.[223] In such cases, the CERD has reiterated the State's duty to protect, pointing out that the State should review its legislation so as to criminalise private conduct which is discriminatory on racial or ethnic grounds.[224] In its General Recommendation 27, the CERD Committee has emphasised the State's duty to protect and respect the rights of the Roma, noting that States should develop educational and media campaigns to educate the public about the Roma, their culture, and the importance of respecting the human rights and the identity of the Roma.[225]

The CERD has also elaborated on the State's duty to promote human rights. Although discussed within the context of racial discrimination, such pronouncements are equally applicable in respect of access to water. Article 2(2) of the ICERD

[220] See United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations on Australia* (2005) para 36.
[221] See section 2 5, chapter 2.
[222] See 3 5 2 6 above.
[223] United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations on the United States of America* (2005) UN Doc A/56/18 (2005) para 392.
[224] Para 392.
[225] CERD *General Recommendation 27* (2000) para 31.

prescribes States to adopt special and concrete measures to ensure the adequate development of certain racial groups to guarantee them full and equal enjoyment of human rights. In this respect the State is obliged to adopt measures to ensure that it facilitates vulnerable groups' access to water. In General Recommendation 27 on the welfare of the Roma people, the CERD enjoins States to take steps to ensure the employment of Roma in both public and private institutions.[226] Furthermore, the CERD has suggested that States adopt and implement special measures in favour of Roma in public employment such as public contracting and other activities undertaken by the government, or training Roma in various skills or professions.[227] This recommendation from the CERD clearly reflects the duty imposed on States to promote the rights of the Roma people, though not expressly stated in a manner similar to that adopted by the CESCR. Nevertheless, it shows the CERD's implicit adoption of the State duty to promote as used by the CESCR in its analysis of State obligations imposed by the ICESCR. The CERD has also elaborated the duty of States to recognise and protect the rights of indigenous peoples to own, develop and use their communal lands and resources which would obviously encompass water sources.[228]

In its Concluding Observations on Suriname, the CERD pointed out that the State is not only obliged to respect but should also promote rights. The CERD noted that the State appeared content with limiting itself "to not hampering the exercise by the various ethnic groups and their members of their cultural rights."[229] The CERD recommended that the State not only respect, but also promote the indigenous and people's cultures, languages and distinctive ways of life.[230] Similarly, the CERD expressed similar views in its Concluding Observations on Nepal.[231] It noted the segregationist practises against the *Dalits* due to the impunity associated with the hierarchical social system in that country.[232] Such discrimination results in the denial of access to public spaces, places of worship and public sources of food and water

[226] Paras 27-29.
[227] Paras 27-29.
[228] Para 5.
[229] United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations on Suriname* (2004) UN Doc A/59/18 para 201.
[230] Para 201.
[231] United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations on Nepal* (2004) UN Doc CERD/C/64/CO/5.
[232] Para 12.

for the *Dalits*.[233] The CERD thus urged the State to take measures to prevent, prohibit and eliminate private and public practices that constitute segregation of any kind and which results in the denial of *Dalits* access to basic services such as water.[234]

In its Concluding Observations on Slovakia,[235] the CERD noted the critical health situation of some Roma communities, which is largely a consequence of their poor living conditions and lack of basic amenities such as safe water. The CERD obliged the State to take further measures to address the issues of drinking water supplies and sewage disposal systems in Roma settlements.[236] The CERD took a similar position in the case of Lithuania. It urged the State to take measures to address the issues of drinking water supplies and sewage disposal systems in Roma settlements due to the critical health situation of some Roma communities, which is largely a consequence of their poor living conditions.[237] The CERD has also emphasised the State's duty to provide necessary facilities, particularly in respect of marginalised groups, for a dignified existence. The CERD has enjoined States to take necessary measures "as appropriate, for offering Roma nomadic groups or *Travellers* camping places for their caravans, with all necessary facilities."[238] The CERD further underscored the State's need to provide Travellers with more parking areas equipped with the necessary facilities and infrastructure located in clean environments.[239] Such facilities inevitably encompass social services such as access to safe water among others. This reflects the State's duty to facilitate, which is part of the State's duty to fulfill as explained by the CESCR in its general comments.

In its Concluding Observations on Slovakia, the CERD specifically enjoined the State to take measures to address the issue of drinking water supplies in Roma settlements.[240] States are further enjoined to provide indigenous peoples with conditions allowing for sustainable economic and social development compatible with

---

[233] Para 12.
[234] Para 12.
[235] See United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations on Slovakia* (2004) UN Doc CERD/C/65/CO/7.
[236] Para 11.
[237] See United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations on Lithuania* (2006) UN Doc CERD/C/LTU/CO/3.
[238] See United Nations Committee on Racial Discrimination *Concluding Observations on France* (2005) UN Doc A/60/18 para 110
[239] Para 110.
[240] United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations on Slovakia* (2005) UN Doc A/59/18 para 388.

their cultural characteristics.[241] This entails indigenous peoples' access to water through their traditional means. In its Concluding Observations on Israel,[242] the CERD expressed its concern at the unequal distribution of water resources to the detriment of Palestinians. It thus called upon the State to ensure equal access to water resources to all without any discrimination.[243]

The above analysis of the general recommendations and concluding observations shows that the CERD has not explicitly adopted the quartet of obligations, which is the "respect, protect, promote and fulfil" framework in its analysis of State obligations imposed by the ICERD. What is clear, however, is that the typologies framework appears to be implicit in the analytic work of CERD. The CERD has used such phrases as the State's duty to "provide indigenous peoples with conditions allowing for a sustainable economic and social development" which is similar to the duty to the "facilitate" component of the obligation to fulfil. The CERD has underscored the State's duty to "provide necessary facilities" which is also analogous to the obligation to fulfill as used in the quartet typology. The CERD has also elaborated on the State's duty to "take measures to prohibit and eliminate private practices that constitute segregation." The latter is similar to the duty to protect as used by the CESCR or CEDAW Committee. The following section discusses the regional systems for the protection of human rights jurisprudence of regional treaty bodies as it relates to the right to water and the use of typologies as an analytic framework to delineate State obligations.

4 3 3 The European Social Charter

The European Social Charter was first adopted in 1961.[244] In 1996, the Revised European Social Charter (hereinafter referred to as the "Revised Charter") was adopted after a review of many of the socio-economic rights in the 1961 instrument was undertaken.[245] In acceding to the Revised Charter every State Party agreed to consider Part 1 of that instrument as a "declaration of the aims which it will pursue by

[241] United Nations Committee on the Elimination of Racial Discrimination *General Recommendation 23 on Indigenous People* (1997) UN Doc. A/52/18 annex V para 4.
[242] United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations on Israel* (2007) UN Doc CERD/C/ISR/CO/13.
[243] Para 35.
[244] European Social Charter (1961) ETS no 5. For a discussion of the European Social Charter, its collective complaints mechanism and institutions see O De Schutter "The European Social Charter" in C Krause & M Scheinini *International Protection of Human Rights: A Textbook* (2009) 425-442.
[245] Revised European Social Charter (1996) ETS no 35.

all appropriate means."[246] States undertake to attain the conditions in which the rights and principles enumerated in Part 1 may be effectively realised "by all appropriate means, both national and international in character."[247] De Schutter has pointed out that this undertaking is, in principle, considered not to be the source of legal obligations. He points out that the objectives enumerated in Part 1 may guide the interpretation of the rights listed in Part II of the Revised Charter.[248] State parties under the Revised Charter are not obliged to accept all the rights it contains and this constitutes part of the unusual *a la carte* system in which a State may decide to accept to be bound by a limited number of provisions.[249] It has been explained that the reason for such a system was primarily due to the considerable discrepancies in the levels of economic development and social progress among the different Member States of the Council of Europe at the time when the original Charter was adopted.[250]

Notable rights protected under the European Charter include the rights to housing,[251] health,[252] social security,[253] protection against poverty and social

[246] See article A of the Revised Social Charter. The Revised European Social Charter is divided in six parts, numbered from I to VI, and an Appendix. Part II contains the list of the substantive provisions.
[247] See introductory paragraph of Part 1.
[248] O De Schutter "The European Social Charter" in C Krause & M Scheinini *International Protection of Human Rights: A Textbook* (2009) 425 428.
[249] State Parties to the original European Social Charter are obliged to accept at least five out of seven core rights, and in total either 10 out of the 19 articles or 45 out of the 72 numbered paragraphs in that treaty. State parties to the Revised Social Charter must agree to be bound by at least six of the nine core rights as well as at least 16 of the 31 articles or 63 out of 98 numbered articles in that instrument. See U Khaliq & R Churchill "The European Committee of Social Rights: Putting Flesh on the Bare Bones of the European Social Charter" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 428 429-430. For further explanation of the *a la carte* system under the European Social Charter and the Revised European Social Charter see O De Schutter "The European Social Charter" in C Krause & M Scheinin (eds) *International Protection of Human Rights* (2009) 425 428-429.
[250] See Gomien, D Harris & L Zwaak *Law and Practice of the European Convention on Human Rights and the European Social Charter* (1996) 380.
[251] Article 31 of the Revised Social Charter.
[252] Article 11. The right to health imposes three basic obligations upon States. Article 11 provides that:

> "With a view to the effective exercise of the right to protection of health, the …parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:
> 1. To remove as far as possible the causes of ill health;
> 2. To provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
> 3. To prevent as far as possible epidemic and other diseases, as well as accidents.

The ESCR committee set out its approach to the interpretation of and application of article 11, noting that "the right of protection to health in article 11 of the Charter complements articles 2 and 3 of the European Convention on Human Rights as interpreted by the European Court of Human Rights – by imposing a range of positive obligations designed to secure its effective exercise." See Conclusions on Revised Social Charter XVII-2 vol. 1(2005) 10.
[253] See Revised Social Charter, article 12.

exclusion,[254] social welfare services,[255] healthy working conditions,[256] social and medical assistance,[257] among others. Unlike the socio-economic rights contained in the ICESCR, the rights contained in the European Charter are not in their formulation expressly subject to progressive realisation.[258] The European Charter shares similarities with other instruments containing socio-economic or civil and political rights in that a number of its rights are "framed in vague and hortatory language."[259]

The European Committee of Social Rights (hereinafter referred to as the "ECSR") is a body of independent experts which monitors State compliance with the Revised Charter. It plays a significant role in both the collective complaints procedure and reporting procedures under the Revised Charter. The ECSR has generated considerable jurisprudence through its conclusions on individual State reports and its findings on collective complaints. The ECSR has not expressly deployed the typologies approach in assessing State compliance with the obligations imposed by the Revised Charter in its decisions on collective complaints or conclusions on State reports. It has generated significant jurisprudence under articles 31, 16 and 11 of the Revised Charter dealing with the rights to housing, the right of the family to social, legal and economic protection, and the right to protection of health respectively. This section will discuss some of the jurisprudence of the ECSR to demonstrate the framework of analysis deployed by the ECSR in its adjudication of State obligations under the Revised Charter. The selected cases are also significant in that the ECSR derived the right to water under articles 31, 16 and 11 even though the right to water is not expressly provided for under such provisions.

Article 31 of the Revised Charter imposes three distinct duties on States, to promote adequate access to housing of an adequate standard, to prevent and reduce homelessness with a view to its gradual elimination, and to make the price of housing accessible to those with limited resources.[260] In its analysis of article 31, the ECSR has pointed out that adequate housing means a "dwelling which is structurally

---

[254] Article 30.
[255] Article 14.
[256] Article 3.
[257] Article 13.
[258] Khaliq & Churchill "The European Committee of Social Rights" in *Social Rights Jurisprudence* 430.
[259] 428.
[260] Article 31 of the Revised European Social Charter provides that:

> "With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:1. to promote access to housing of an adequate standard; to prevent and reduce homelessness with a view to its gradual elimination and to make the price of housing accessible to those without adequate resources."

secure, safe from sanitary and health perspective."[261] It further elaborated that a dwelling is considered safe from a sanitary and health point of view if it possesses all basic amenities, such as water, heating and waste disposal.[262] The ECSR's has adopted the position that rights of access to certain utilities such as water are included in the obligation and, at the very least, should be provided by the State to those who cannot provide them. The ECSR has further imposed on States an obligation to protect against the interruption of essential services such as water.[263] This reflects an obligation to respect pre-existing access to rights as used by such treaty bodies as the CESCR, the African Commission and the CEDAW committee.

The ECSR has further pointed out that States are obliged to provide homeless persons with adequate housing if they so request it, within a reasonable period of time.[264] This obligation, according to the ECSR, is clearly progressive and entails both reactive and preventive measures.[265] As the ECSR noted in its assessment of France, reducing homelessness requires the provision of measures such as shelter and to help such people overcome their difficulties and prevent a return to homelessness.[266] Although expressed in the context of the right to housing, such views are also applicable with respect to the right to water. The ECSR, as shown in the above paragraph, has not hesitated to derive a right to water from the right to housing. This is in line with the approach of other treaty bodies such as the CESCR as illustrated in chapter 2.[267] The following section discusses some of the jurisprudence of the ECSR to demonstrate how the latter has elaborated the obligations imposed on the State by the rights protected in the Revised Charter.

4 3 3 1 *European Federation of National Organisations v France*

In the case of *European Federation of National Organisations working with the Homeless (FEANTSA) v France* (hereinafter referred to as "*FEANTSA v France*"),[268] FEANTSA argued that France had violated article 31 of the Revised Charter by not ensuring an effective right to housing for its residents. In particular, FEANTSA argued

[261] See *Conclusions of the European Committee of Social Rights* Conclusions on France (2005) 221
[262] 221.
[263] 224.
[264] 225.
[265] 225.
[266] 226.
[267] See section 2 5 2 4 above.
[268] European *Federation of National Organisations working with the Homeless (FEANTSA) v France Complaint* no 39/2006, decision on the merits 5 December 2007.

that the measures in place in France to reduce the number of homeless people were insufficient and that a significant number of households lived in poor housing conditions.[269] FEANTSA further alleged that the system for allocating social housing discriminated against immigrants in their access to housing.[270]

The State argued that it had not violated article 31 of the Revised Charter as it interpreted this provision as only requiring States to take measures and that the numerous laws, policies and plans on housing adopted by the authorities prove that France respects this provision.[271] In other words, France argued that article 31 only imposed on States an obligation of conduct. This meant that so long as suitable measures were taken with a view to securing the right to adequate housing, the situation would be in conformity with the Revised Charter.[272]

The ECSR pointed out that article 31 cannot be interpreted as imposing on States an obligation of result.[273] Nevertheless, the ECSR noted that the rights recognised in the Revised Charter must take a practical and effective, rather than purely theoretical, form.[274] The ECSR therefore ruled that for a State to be in compliance with the provision, it must:

> "a. adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter;
>
> b. maintain meaningful statistics on needs, resources and results;
>
> c. undertake regular reviews of the impact of the strategies adopted;
>
> d. establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;
>
> e. pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable."[275]

The ECSR explained that implementation of the rights in the Revised Charter does not only require States merely to adopt legal measures. Rather, States must also

[269] Paras 7-10.
[270] Paras 7-10.
[271] Para 18.
[272] Para 54.
[273] Para 54.
[274] Para 55.
[275] Para 56.

provide resources and introduce the operational procedures necessary to give full effect to the rights.[276] The ECSR, citing its earlier decision in *Autisme Europe v France*, [277] pointed out that:

> "When one of the rights in question is exceptionally complex and particularly expensive to implement, States parties must take steps to achieve the objectives of the Charter within a reasonable time, with measurable progress and making maximum use of available resources."[278]

The ECSR pointed out that article 31(1) guarantees adequate housing for everyone, which means a dwelling which "is safe from a sanitary and health point of view" and such a dwelling "must also possesses all basic amenities such as water."[279]

4 3 3 2 *European Roma Rights Centre v Italy*

In the case of *European Roma Rights Centre v Italy*,[280] the European Roma Rights Centre (hereinafter referred to as "the ERRC") alleged that the housing situation of Roma in Italy amounted to a violation of article 31 of the Revised Charter. In particular, the ERRC alleged that Roma were denied an effective right to housing because of the shortage of and inadequate living conditions in camping sites, the forced evictions Roma people are often subjected to, and the fact that Roma have no access to accommodation other than camping sites. In addition, the ERRC alleged that segregationist policies and practices in the field of housing constituted racial discrimination contrary to article 31 read alone or in conjunction with Article E.[281]

The ECSR reiterated its position that guarantees of access to adequate housing means a dwelling which is structurally secure, safe from a sanitary and health point and possesses all basic amenities such as water.[282] The ECSR further pointed out that the prohibition against discrimination imposes an obligation on the

---

[276] Para 57.
[277] *Autisme Europe v France, Complaint* no 13/2002, decision on the merits of 4 November 2003, para 53.
[278] *FEANTSA v France* para 57.
[279] Para 76.
[280] European *Roma Rights Centre v Italy, Complaint* no 27/2004, decision on the merits of 29 June 2004.
[281] *European Roma Rights Centre v Greece Complaint* no 15/2003, decision of 8 December 2004 para 5. Article E of the European Charter contains an equality clause requiring States to ensure that the rights they have accepted are secured without discrimination on any of the listed grounds. In its conclusions on France, the ECSR stated unequivocally that the equal treatment obligation under that provision must be assured to the different groups of "vulnerable persons." See European Committee on Social Rights *Conclusions on France* (2003) 221.
[282] Para 35.

State to ensure that vulnerable groups such as Roma benefit in practice from the rights protected under the Revised Charter.[283] The ECSR ruled that by persisting with the practice of placing Roma in camps the State had failed to take adequate steps to ensure that the Roma have access to housing of a sufficient quantity and quality to meet their particular needs in violation of articles 31 read with article E of the Revised Charter.[284]

4 3 3 3 *European Roma Rights Centre v Greece*

The ECSR has adjudicated the claims predicated on article 16[285] of the Revised Charter which provides for the right of the family to social, legal and economic protection. The jurisprudence of the ECSR shows that this provision has implications for the right of access to water as reflected in the case of *European Roma Rights Centre v Greece*.[286]

The ERRC alleged that the Greek government had violated its obligations under article 16 of the Revised Charter. The ERRC alleged that the Roma are denied an effective right to housing in that legislation discriminates against the Roma in housing matters. It was further alleged that there is widespread discrimination against Roma and the latter are often the subject of forced evictions.[287] The ECSR, citing its earlier decision in the case of *International Commission of Jurists v Portugal* [288] stated that the implementation of the rights protected in the Revised Charter requires the State to take not merely legal action, but also practical action to give full effect to the protected rights.[289] Significantly, the ECSR pointed out that article 16 entails the exercise of many other rights – civil and political as well as economic, social and cultural[290] as these rights are of central importance to the family. The ECSR further noted that article 16 obliges the State to promote the provision of an adequate supply of housing for families and such dwellings must have basic amenities such as safe water.[291]

---

[283] Para 37.
[284] Para 37.
[285] Article 16 of the Revised Social Charter provides for the right of the family to social, legal and economic protection.
[286] *European Roma Rights Centre v Greece* Complaint No 15/2003, decision of 8 December 2004.
[287] Para 11.
[288] *International Commission of Jurists v Portugal* Complaint No 1/1998, decision of 9 December 1999, para 32.
[289] *European Roma Rights Centre v Greece* para 20.
[290] Para 24.
[291] Para 24.

The ECSR has not explicitly adopted the typologies approach as used by other treaty bodies. Nevertheless, the ECSR has stressed the need to look beyond the letter of the law to see how effectively it operates in practice. The ECSR stated in *International Commission of Jurists v Portugal* that "the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact."[292] It is pertinent to note that in the *FEANTSA v France* case discussed above, despite the wide array of legislative measures on housing that France had adopted, the ECSR's approach was to emphasise that a State may still be held to be in breach of its treaty obligations under the ECSR where such legislative undertakings have not been operationalised.

This decision reflects the ECSR's interpretive approach. In its determination of State compliance with the rights in the Revised Charter, "the objective of full implementation of rights is the ultimate assessment grid for public policies."[293] The ECSR's approach is that it is not enough for the State simply to describe the efforts made to realise rights, without an evaluation of the outcomes of such policies. This approach is further reflected in the ECSR's approach in *European Roma Rights Centre v Italy* which insisted on legal remedies and legal aid to challenge forced evictions as an aspect of the right to housing. This may also be seen as an element of the obligation on the State to guarantee rights effectively.

In respect of those positive obligations involving significant resources expenditure by the State, it should be noted that no allowance for resource constraints is made in the text of the Revised Charter. This is different from the text of the ICESCR which expressly provides for a defence predicated on lack of resources in the event of a State's inability to fulfill its obligations under the ICESCR. The issue of resources was raised by the ECSR in *European Roma Rights Centre v Greece* discussed above. The ECSR noted that the obligations imposed by the ECSR require States to take measures to realise the aims of the Revised Charter "within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources."[294] The phrases "within a reasonable time" and "measurable progress" parts of this formula are substantially similar to the obligations imposed on States under article 2 (1) of the ICESCR which enjoins States

[292] *International Commission of Jurists v Portugal* para 32.
[293] P Kenna & M Uhry "France violates Council of Europe Right to Housing" (2008) *Homeless Europe* 9 9.
[294] *European Roma Rights Centre v Greece* para 20.

to progressively realise the rights entrenched in that instrument. The ECSR appears to have adopted an implicit reasonableness review test.

4 3 4 Inter-American System

The Inter-American system for the protection of human rights consists of a number of instruments. The significant ones include the American Declaration of the Rights and Duties of Man (hereafter referred to as "the American Declaration")[295] and the American Convention on Human Rights (hereafter referred to as "the American Convention"),[296] the Protocol to the American Convention on Human Rights on the Abolition of the Death Penalty,[297] the Inter-American Convention to Prevent and Punish Torture,[298] the Inter-American Convention on Forced Disappearance of Persons,[299] the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women,[300] and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (hereafter referred to as "the Protocol of San Salvador.")[301]

The American Declaration provides a full spectrum of socio-economic rights as well as civil and political rights. The socio-economic rights include the right to protection for maternity and childhood,[302] the right to health,[303] the right to education,[304] the right to culture,[305] and the right to employment and fair remuneration.[306] Other rights protected include the right to housing,[307] the right to property,[308] the right to special protection for mothers, children and the family,[309] and the right to social security.[310] The American Convention also includes an extensive

[295] American Declaration of the Rights and Duties of Man (1948) OAS doc OE A/Ser L/V/II.65 Doc 6.
[296] American Convention on Human Rights(1969) 1144 UNTS 123.
[297] Protocol to the American Convention on Human Rights on the Abolition of the Death Penalty (1990) OEA/Ser LV/II82 doc.6 rev.1.
[298] Inter-American Convention to Prevent and Punish Torture (1985) OEA/Ser LV/II.82 doc 6 rev1.
[299] Inter-American Convention on Forced Disappearance of Persons (1994) 33 ILM 1429.
[300] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994) 33 ILM 1534.
[301] The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) OEA/Ser LV/II.82 doc 6 rev1.
[302] American Declaration on the Rights and Duties of Man, article 7.
[303] Article 11.
[304] Article 12.
[305] Article 13.
[306] Article 14.
[307] Articles 9 and 11.
[308] Article 23.
[309] Articles 6 and 7.
[310] Article 16.

catalogue of economic, social and cultural rights. These include the rights to adequate food, housing, health, social security, education, unionisation, employment, just labour conditions and to social security.[311] The American Convention further protects the rights to life and personal integrity.[312] These latter provisions are important, particularly with regard to the protection of economic and social rights including the right to water. The Inter-American Court of Human and People's Rights (hereafter "the Inter American Court"), as will be shown below, has addressed essential aspects of the right to water, health, education, food, recreation, sanitation and adequate housing all of which are important for a dignified life under the rights to life and personal integrity.[313]

The Inter-American Commission on Human Rights (hereinafter referred to as the "Inter-American Commission")[314] and the Inter-American Court[315] have generated extensive jurisprudence on socio-economic rights. Of particular significance is the willingness of the Inter-American Commission and Inter-American Court to develop standards relating to the duties of the State to protect and ensure the realisation of various rights, including the right to water. It is, however, noteworthy that unlike the African Commission, both the Inter-American Commission and court have not explicitly used the typologies framework as an analytical tool in their interpretation of State obligations imposed by the various human rights instruments under the Inter-American system. Nevertheless, it can be argued that the typology is implicit in those institutions' interpretation of the obligations imposed on States by human rights instruments under that regional system.

The protocol of San Salvador incorporates a catalogue of detailed and well-defined socio-economic rights. These include the rights to health and a healthy environment, food, education, work, just and equitable conditions of work, social security, benefits of culture, and special protection of the family, children, the elderly and persons with disabilities.[316] The Protocol of San Salvador entitles everyone to

[311] These rights are guaranteed under article 26 of the American Convention on Human Rights.
[312] See American Convention on Human Rights, articles 4 and 5.
[313] See TJ Melish "The Inter-American Court of Human Rights: Beyond Progressivity" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 372 388-392.
[314] The Inter-American Commission has both a mandate to promote human rights as well as to consider petitions concerning the violation of human rights. See arts 41–51 of the American Convention on Human Rights.
[315] The Inter-American Court has both a contentious and advisory jurisdiction, see articles 61-64 of the American Convention on Human Rights.
[316] See Protocol of San Salvador, articles 6-18.

"the right to live in a healthy environment and to have access to basic public services."[317] This provision has been interpreted to encompass a right of access to water.[318] The right of access to water is a vital component of a healthy environment. Lack of access to safe water, as discussed above, is one of the major causes of ill health and mortality. The right to a healthy environment necessarily incorporates the right to access safe water.

The Inter-American Commission has been consistent in applying the same legal obligations to all human rights obligations protected in the regional instruments despite their characterisation as civil, cultural, economic, political or social.[319] The Inter-American Commission has, for the purposes of assessing States' compliance with their obligations, applied the general duties to "respect" and to "ensure" through the adoption of appropriate, necessary or reasonable measures, and the free and full exercise of guaranteed rights to all individuals within a State's jurisdiction.[320] The following section discusses some of the decisions of the Inter-American Commission and the Inter-American Court in order to analyse the interpretive framework used in determining States' compliance with their obligations, with particular reference to water rights.

Articles 1.1 and 2 of the American Convention provide for "general obligations" that apply to all the rights protected in the treaty. These encompass the interrelated duties to respect all recognised rights and freedoms and to ensure their free and full exercise by all persons subject to the ratifying State's jurisdiction without discrimination.[321] Article 2(2) of the American Convention buttresses the article 1(1) "duty to ensure" by noting that while formal guarantees of rights and freedoms are necessary, on their own they are not sufficient. Rather, State parties must ensure that protected rights and freedoms truly have domestic legal effect.

The Inter-American Court has pointed out that articles 1(1) and (2) impose duties on States parties to adopt all necessary and appropriate measures, of a legislative, administrative, judicial or other character.[322] Most recently, the Inter-

[317] Art 11.
[318] Centre on Housing Rights and Evictions *Manual on Right to Water and Sanitation* (2008) <http://www.cohre.org> (accessed 26.02.2010).
[319] TJ Melish "The Inter-American Commission on Human Rights: Defending Human Rights Through Case-Based Petitions" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 339 348.
[320] 348.
[321] American Convention on Human Rights, article 1.1.
[322] *Velasquez Rodriguez v Honduras*, Judgement of July 29, 1988, Inter-Am CtHR (Ser C) no 4.

American Court has expanded its understanding of the duty to ensure to include a duty to provide (or fulfil), also assessed on the basis of reasonableness in the circumstances. This duty arises where individuals cannot meet their own needs necessary for the enjoyment of their rights without affirmative State assistance. This includes such instances where persons are deprived of liberty in State-controlled custodial contexts, such as prisons and similar detention facilities.[323] Notably, it also arises in situations of vulnerability that impede individuals from meeting, on their own, the basic needs necessary for the full and free exercise of their rights such as the right of access to water. The Inter-American Court has, in this sense, affirmed that "special conduct-based obligations" derive from the general duties in article 1(1) of the American Convention. Such obligations will be predicated on a particular right-holder's needs of protection to respond to situations of particular stress or vulnerability.[324]

The Inter-American Court has also emphasised the State's liability where a public authority fails to adopt appropriate measures to respond to the abusive conduct of a private party. In the *Pueblo Bello* case, the Inter-American Court pointed out that article 1(1) of the American Convention was essential in determining whether a violation of a human right recognised by that treaty can be imputed to a State Party.[325] What is noteworthy under the Inter-American system for the protection of human rights is that distinctions between "negative" and "positive" duties are not the main criterion in deciding cases as the Inter-American Court has treated the two as inseparable. The result is that States are regularly found in simultaneous and coordinated breach of their international legal obligations to "respect" and "ensure."[326] A scenario like that, all too common in Latin America, may occur, for example, where a State grants a concession to a private company to exploit natural resources on lands ancestrally inhabited by indigenous communities (breach of the negative obligation to respect rights), without taking appropriate "preventive" measures to delimit, demarcate and title the land in question (a breach of the positive duty to

[323] *Case of Children's Rehabilitation v Paraguay*, Judgement of September 2, 2004, Inter-Am CtHR (Ser C) No112.
[324] *Case of Pueblo Bello Massacre v Colombia*, Judgement of January 31, 2006, Inter-Am Ct HR (ser C) No 140 para 111.
[325] *Pueblo* paras 113-114.
[326] 384.

protect rights).[327] Some of the following cases reflect that approach of the Inter-American Court.

4 3 4 1 *Maya Indigenous Community of the Toledo District v Belize*

In the *Maya Indigenous Community of the Toledo District v Belize,*[328] Belize granted logging and oil concessions to a foreign oil extraction company on lands traditionally used and occupied by the Maya indigenous community. This was done without their consent and without any process of prior consultation. The Inter-American Commission found Belize internationally responsible for violating the rights of the Maya to property and to equality under articles XXIII and II of the American Declaration. The Inter-American Commission pointed out that the State was liable for failure:

> "To take effective measures to delimit, demarcate and officially recognise their communal property right to the lands that they have traditionally occupied and used, and by granting logging and oil concessions to third parties to utilise the property and resources that could fall within the lands which must be delimited, demarcated and titled without consultations with and informed consent of the Maya people." [329]

Based on these findings, the Inter-American Commission recommended that the State recognise the Maya peoples' communal property right to the lands they have traditionally occupied. It further enjoined Belize to delimit, demarcate and title the territory in which their communal property right exists in accordance with the customary land use practices of the Maya people. The Inter-American Commission further recommended that the State and its agents must not interfere with the Maya territory until it is properly delimited, demarcated and titled.[330]

4 3 4 2 *Yakye Axa Indigenous Community v Paraguay*

The case of *Yakye Axa Indigenous Community v Paraguay*[331] involved members of a displaced indigenous community living in extreme poverty and deprived of food, water and housing. The *Yakye Axa* community, a Paraguayan indigenous

[327] 384.
[328] *Maya Indigenous Community of the Toledo District v Belize* 2004 Case 12.053, Inter-Am CtHR OEA/Ser L/V/II.122 Doc 5 rev 1.
[329] Para 5.
[330] Para 6
[331] *Yakye Axa Indigenous Community v Paraguay*, Judgement of June 17, 2005, Inter-Am CtHR (Ser C) No 125.

community, filed a complaint with the Inter-American Commission alleging that Paraguay had failed to acknowledge its right to property over ancestral land. Given the failure by Paraguay to comply with the recommendations of the Inter-American Commission, the later referred the matter to the Inter-American Court. Despite the inhuman conditions in which the community lived, and their settlement's proximity to their traditional water and food sources, a local domestic court had forbade the community re-entry into its ancestral land. The community was unable to access traditional sources of potable water, cooking wood, building materials and food. The community's situation of extreme impoverishment was so grave that the State was compelled to declare a state of emergency.

The Inter-American Court held that the State had violated the right to life of the members of the *Yakye Axa* community under article 4 of the American Convention. This was predicated on the State's failure to take appropriate and necessary positive measures to alleviate the horrendous conditions that limited the community members' possibility of having a dignified life.[332]

The responsibility of the State emanated from two grounds. The local court order prohibiting the community members from entering their ancestral territory to access, on their own, clean water, food and traditional medicines was a breach of a negative obligation to respect the right to clean water, food and health. Additionally, the failure by the State to take positive responsive measures to address the urgent plight of the displaced community constituted violation of a positive duty to provide and facilitate access to water, health and food.[333] The Inter-American Court emphasised the close link between access by indigenous peoples to their ancestral territory and enjoyment of their rights to health, food, clean water, education, and to cultural identity. The court considered all such rights necessary to ensure the community's "right to a dignified existence."[334] The Inter-American Court further pointed out that the State has a duty to generate the minimum conditions of life compatible with human dignity, and that this requires the adoption of positive, concrete measures oriented to the satisfaction of the right to a dignified life.[335]

The Inter-American system has not explicitly adopted the typologies approach of respect, protect, promote and fulfill in its analysis of State obligations imposed by

[332] Para 82.
[333] Paras 74-75.
[334] Para 72-73.
[335] Para 68.

human rights instruments under that system. The Inter-American Commission and Court have applied the general duties to "respect" and to "ensure" through the adoption of appropriate, necessary or reasonable measures aimed at guaranteeing the free and full exercise of rights to all individuals within a State's jurisdiction. What is noteworthy is that the typologies as discussed in the opening section of this chapter, although not explicitly articulated, are nevertheless implicit in the approach of the Inter-American Commission and Court. For instance, in the *Maya Indigenous Community of the Toledo District v Belize case*, the Inter-American Commission enjoins the State to recognise the Maya peoples' communal property right to the lands they have traditionally occupied. It further enjoined Belize to delimit, demarcate and title the territory in which their communal property right exists in accordance with the customary land use practices of the Maya people. Furthermore, the Inter-American Commission recommended that the State and its agents must not interfere with the *Maya* territory until it is properly delimited, demarcated and titled.[336] In the *Pueblo Bello* case, the Inter-American Court emphasised the State's duty to "reasonably prevent" and "appropriately respond" to human rights violations, through the adoption of necessary measures to prevent harms caused by third parties.[337] This clearly shows that the protect and fulfill duties were in the background of the Inter-American Commission and Court's determination of these cases.

4 3 5 Jurisprudence of the African Commission

4 3 5 1 *Free Legal Assistance Group v Zaire*

The African Commission has, on several occasions, been presented with an opportunity to rule on disputes that have implications for the implementation of a human right to water. As discussed in chapter 2, the African Commission has inferred the right to water from other related rights in the African Charter.[338] In *Free Legal Assistance Group v Zaire*[339] the African Commission emphasised the State's duty to fulfill the right to water. In that case, the complainants brought a claim against the Democratic Republic of Congo (then known as Zaire) alleging gross mismanagement of public funds by the State and violations of a host of other civil and political rights. These included torture, arbitrary arrests and detentions, extra-judicial killings and

[336] *Maya Indigenous Community of the Toledo District v Belize* para 6.
[337] *Pueblo* paras 113-114.
[338] See section 2 5 4 1 check, chapter 2.
[339] *Free Legal Assistance Group and Others v Zaire*, Communication nos 25/89, 47/90, 56/91, 100/93.

severe restrictions on freedoms of association and assembly.[340] The complainants alleged that the abuse of public funds resulted in horrendous and degrading conditions reflected in shortages of medicine, education and basic services such as clean drinking water. The State was held to have failed to provide these services thereby impairing its people from accessing basic services.[341] The African Commission held that the failure of the State to provide basic services such as safe drinking water constituted a violation of article 16 of the African Charter which provides for the right to health.[342]

This case is significant in that the African Commission reiterated the State's obligation to fulfill socio-economic rights, including the right to safe and clean water. The African Commission made this determination on the backdrop of a factual finding that the State was abusing public resources. Its failure to provide clean water to its population was therefore not predicated on a lack of resources.

4 3 5 2 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*

The African Commission has also delineated the State's protective duty with regard to the right to water in the *SERAC* case. The communication alleged that a consortium comprising the State-owned Nigerian Petroleum Company and a private entity, the Shell Petroleum Development Company had committed a range of human rights violations.[343] It was alleged that the consortium had exploited oil resources in Ogoniland, Nigeria, without due regard for the health or environment of the local communities.[344] This resulted in water, soil and air pollution causing serious health problems for local communities. The African Commission found Nigeria to have violated a range of civil, economic, social and political rights.[345] These included the right not to be discriminated against, the rights to life, property, health, family protection, satisfactory environment and the right of peoples to freely dispose of their wealth.[346]

---

[340] Paras 1-5.
[341] Paras 45-46.
[342] Para 47.
[343] See paras 1-9.
[344] Para 2.
[345] See paras 57-69.
[346] See an analysis of the decision, see DM Chirwa "African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 323 324-326.

The African Commission emphasised both the duty of the State to respect the right to water by desisting from interference as well as the State's protective duty in the context of violations of this right by third parties.[347] It decided that contamination of drinking water sources by the consortium amounted to a violation of article 16 of the African Charter which provides for the right to health and article 24 which protects the right to a satisfactory environment. The significance of the African Commission's finding is that it derived the rights to food and housing from a range of other rights in the African Charter thus explicitly endorsing the interelatedness of all human rights discussed in chapter 2.[348] The derivation of the right to water from related rights such as health, food and a healthy environment illustrates an approach predicated on the interdependence of human rights explored in chapter 2. The approach of the African Commission reinforces the indivisibility and inter-dependant nature of all human rights.[349]

4 3 5 3 Centre for Minority Rights Development (Kenya) and Another v Kenya

In the *Centre for Minority Rights Development (Kenya) and Another v Kenya* (hereinafter referred to as "*Endorois*"),[350] the communication alleged that the government of Kenya had violated various provisions of the African Charter in respect of an indigenous community, the *Endorois* people. This involved forcibly removing the *Endorois* from their ancestral land, failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise, and violations of the right to practise their religion and culture as well as the overall process of development of the *Endorois* people.[351] It was further alleged that the *Endorois* community had been unable to access the vital resources in the

[347] Para 45.
[348] See 2 5 2 1, chapter 2.
[349] See DM Chirwa "African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 323 324-325.
[350] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication no 276/2003.
[351] Para 96.

Lake Bogoria region since its eviction from the game reserve,[352] including the ability to use the salt licks, water, and soil of Lake Bogoria.[353]

The complainants further alleged that the State had granted concessions for ruby mining on *Endorois* traditional land to a private company in 2002. This resulted in the poisoning of the only remaining water source used by the *Endorois* community, both for their own personal consumption and for use by their livestock.[354] The complainants argued that the forced evictions and accompanying human rights violations constituted violations by the State of the rights to adequate food and the right to water implicitly guaranteed under articles 4, 16 and 22[355] of the African Charter as informed by standards and principles of international human rights law.[356]

The African Commission ruled that the State had violated its duty to respect the right to water implicitly guaranteed in the African Charter. The African Commission ruled that access to clean drinking water was severely undermined as a result of the eviction of the *Endorois* from their ancestral lands around Lake Bogoria which had ample fresh water.[357] In this case, the State had violated its obligation to respect the right to water of the *Endorois* community by dispossessing the community of its land around Lake Bogoria from which the community obtained its fresh water supply. Additionally, the State had, through its economic policy, failed to respect the right to water by entering into an agreement with a private company to exploit ruby resources from the *Endorois* community's land, thereby polluting the community's water supply.[358] Furthermore, the State failed to protect the *Endorois* people from the pollution of its water supply through the ruby mining activities of a non-State actor thereby violating the right to water.

This case clearly shows the importance of the respect, protect, promote and fulfill approach as an analytic tool to determine a State's compliance with its obligations imposed by the right to water. In this case, the State's duties to respect, protect and promote the *Endorois*'s access to water were implicated. The approach of the African Commission in the *Endorois* case demonstrates its interpretive approach in emphasising the interdependence and indivisibility of all human rights.

[352] Para 204.
[353] Para 81.
[354] Paras 14 & 214.
[355] These are the rights to life (art 4), health (art 16) and existence (art 20).
[356] See *Endorois* case Para 124.
[357] See paras 238 & 240.
[358] Para 238.

The African Commission found that a violation of the State's obligations to respect and protect the right to water despite the absence of an explicit provision guaranteeing the right to water under the African Charter. Such an interpretive approach allows for an integrated approach to the adjudication of human rights in which attention is paid to the relationships amongst all human rights.[359]

4 3 5 4 *Sudan Human Rights Organisation & Another v Sudan*

The *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudan*[360] case involved complainants of alleged gross, massive and systematic violations of human rights by the government of Sudan against the indigenous Black African tribes in the Darfur region, in particular members of the *Fur*, *Marsalit* and *Zaghawa* tribes.[361] The complainants alleged that the State's military campaign against suspected rebels had targeted the civilian population resulting in villages, markets and water wells being raided and bombed.[362] The complainants further alleged that the State had perpetrated indiscriminate killings, torture, poisoning of wells, rape, forced evictions and displacement and destruction of property in violation of articles 4 and 5 of the African Charter.[363] The complainants invited the African Commission to develop further its reasoning in the *SERAC* case by holding that the right to water was guaranteed under articles 4, 16 and 22 of the African Charter. They further argued that the State had violated the right to water by being complicit in the destruction and poisoning of water wells and denying civilians access to water sources in the Darfur region.[364]

The African Commission ruled that Sudan, in complicity with the *Janjawid* militia, had violated the various rights delineated above, including the right to water, by actively participating in the violation of the rights such as the destruction and poisoning of water wells. The State was also found to have neglected its protective

[359] See section 2 5 2 1, chapter 2. For a further discussion on the organic and related interdependence of human rights, see C Scott "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall Law Journal* 769–878. See also for a discussion of the interdependent conception of human rights Liebenberg *Socio-Economic Rights* 51-54.
[360] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudan communications* 279/03 & 296/05.
[361] Para 2.
[362] Para 13
[363] Para 145.
[364] Para 126.

mandate by failing to protect against the violation of the right to water and various other rights by the *Janjawid* militia in violation of article 16 of the African Charter.[365]

The African Commission again reiterated the State's duty to respect the right to water that is non-interference with existing access to water sources. The destruction and poisoning of water sources was therefore a breach of the obligation to respect the right to water. The State also failed to protect the Darfur communities from destruction and poisoning of its water sources by a private entity, the *Janjawid* militia. The State therefore violated its obligations to respect and protect realisation of the right to water. It can also be argued that the State also violated its obligation to fulfill the right to water in light of its failure to supply the Darfur community with potable water after its own forces and a para-military entity had destroyed and poisoned water sources of people within its jurisdiction.

4 3 6 Conclusion

The preceding section discussed one of the major developments in international human rights theory and practice from the early 1980s, the development of typologies to elaborate the nature of obligations imposed by human rights instruments. It was demonstrated that all human rights, including the right to water, impose a spectrum of duties and that the particular duty applicable in any situation depends on a contextual evaluation of the case at hand. Invariably, distinguishing between the various rights is not very helpful as an analytic model. The above discussion clearly showed that using the typologies of State obligations as an analytical tool has helped to dispel the notion of any fundamental differences between the various human rights. This represents a further step in debunking the negative/positive rights dichotomy as an over-simplification.[366] Rather, the distinction should be between different levels of duties applicable in a particular case.

The section further analysed and discussed the various typologies of duties imposed on States by the right to water as elaborated by the UN independent experts and special rapporteurs, academic commentators and the CESCR in its General

[365] See paras 164, 207 & 212.

[366] Liebenberg has demonstrated the impossibility of maintaining a clear conceptual distinction between negative and positive duties , arguing that an "uncritical acceptance and application of the negative/positive dichotomy can constrain the development of a jurisprudence as well as advocacy strategies which address the deep-seated causes of both civic and socio-economic inequality and deprivation." See S Liebenberg "Grootboom and the Seduction of the Negative/Positive Duties Dichotomy" (2011) 26 *SA Public Law* 38 39.

Comment 15. It was demonstrated that the right to water imposes a quartet level of obligations on States: the obligations to respect, protect, promote and fulfill the right to water. The section also analysed the approach of the CEDAW committee, the CERD and regional systems for the protection of human rights under the Inter-American system and the European system, with a particular focus on the right to water. Some treaty bodies such as the CERD have not consistently used the "respect, protect, promote and fulfil" typology in their general recommendations and concluding observations on State reports. Nevertheless, an examination of some general recommendations and concluding observations adopted by the CERD committee shows that the typologies as used and developed by the CESCR also underpin the CERD committee's views on State reports.

The ECSR has not expressly deployed the typologies approach in assessing State compliance with the obligations imposed by the Revised Charter in its decisions on collective complaints or conclusions on State reports. Nevertheless, the ECSR has generated significant jurisprudence under articles 31, 16 and 11 of the Revised Charter dealing with the rights to housing, the right of the family to social, legal and economic protection, and the right to protection of health respectively. However, the ECSR has read in the right to water under articles 31, 16 and 11 even though the right to water is not expressly provided for under such provisions. It was also shown that, although both the Inter-American Commission and Court have not explicitly used the typologies framework as an analytical tool in their interpretation of State obligations imposed by the various human rights instruments under the Inter-American system, it can be argued that the typology is implicit in those institutions' interpretation of the obligations imposed on States by human rights instruments under that regional system. This clearly shows that the typologies were in the background in the Inter-American Commission and court's determination of the cases discussed above.

The preceding section demonstrated that an analysis of State obligations imposed by the human right to water based on the above typology as an analytic model provides a better understanding of the scope and content of the right to water and helps to safeguard the right, whether water is provided by the State or a private operator. The following section will discuss the concept of the minimum core obligations as it relates to the right to water. It will also discuss and analyse those obligations the ICESCR has deemed to be of an immediate nature, the obligations to

take steps, and the obligation to guarantee realisation of the right to water without discrimination. This will be followed by an exploration of the concept of progressive realisation of the right to water as contained in the ICESCR and elaborated by the CESCR, academic literature and, where relevant, case law in respect of the right to water. This section will conclude with a discussion of two key but contentious concepts in socio-economic rights in general and the right to water in particular, the concepts of "retrogressive measures" and "availability of resources". This will be followed by the interim conclusion.

4 4 Specific aspects of the States' obligations

4 4 1 The minimum core obligation

The concept of minimum core was set out by the CESCR in its General Comment 3 when it stated that:

> "[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party...[A] State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned...In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[367]

[367] See United Nations Committee on Economic, Social and Cultural Rights *General Comment 3, The Nature of States Parties' Obligations* (1990) UN Doc E/1991/23 para 10. See also for example, the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1986) 9 *Human Rights Quarterly* 122 126 which provides that "States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all." The minimum core concept is also recognised in the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998) 20 *Human Rights Quarterly* 691 695, providing that "Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties."

The CESCR explains two components of a right's minimum core, first by distinguishing the immediate effect of the right from its full scope. The minimum core of the right is located at one end of a continuum and the individual is entitled to this basic core for the satisfaction of the essential levels of the right. The non-realisation of the basic core could only be justified by resource constraints but there would be a heavy burden of justification on the State to show that it has prioritised its resources to ensure its fulfilment.[368] Over and above the minimum core entitlements, the State is obliged to adopt legislative measures to achieve progressively the full spectrum of the socio-economic rights guaranteed in the ICESCR.[369] It further defines the nature of those steps that must be taken in the fulfilment of the right's immediate effect.[370]

The idea of "core content" for socio-economic rights was first formulated outside of the UN system, but has since gained widespread support from human rights practitioners and academics, culminating in its adoption by the CESCR.[371] Young has pointed out that this concept may have its origins in German Basic Law, where a right's basic content is protected from legal limitation.[372] The idea of a minimum core obligation suggests that there are degrees of fulfilment of a right and that a certain minimum level of fulfilment takes priority over a more extensive realisation of the right.[373] Bilchitz conceives of minimum core as the very basic interest people have in survival and the socio-economic goods required to survive.[374] Bilchitz further points out that:

> "The recognition of a minimum core of social and economic rights that must be realised without delay attempts to take account of the fact that certain interests are of

[368] CESCR *General Comment 3* (1990) para 10.
[369] Para 10.
[370] See GS McGraw "Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence" (2011) 8 *Loyola University Chicago International Law Review* 101 131.
[371] 131. Philip Alston is often credited with developing the concept of minimum core content. See P Alston "Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 222 223.
[372] Young makes reference to the German Basic Law (1949) art 19(2) which provides that "[i]n no case may the essential content of a basic right be encroached upon." See KG Young "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 115 *Yale Journal of International Law* 113 124.
[373] D Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" (2003) 19 *South African Journal on Human Rights* 1 11.
[374] 11.

> greater relative importance and require a higher degree of protection than other interests."[375]

Protagonists of the minimum core concept whose positions are most developed in relation to the socio-economic rights provisions of the South African Constitution have argued for the concept's immediate enforceability as a benchmark against which government programmes can be assessed.[376] Within the South African context, David Bilchitz has persuasively argued for the adoption of the minimum core concept.[377] Bilchitz has argued that an analysis of obligations imposed by socio-economic rights on the State should entail a minimum core obligation to realise, without delay, the most urgent survival interests.[378] Bilchitz's position is that the recognition that the State has a minimum core obligation to realise essential levels of each right represents a viable and principled method of approaching the justiciability of socio-economic rights.[379] Therefore, each substantive right imposes upon a State a variety of core obligations that the State is obliged to satisfy. These core obligations correspond to the satisfaction of the essential level without which a State is in violation of its obligations under the ICESCR.[380] Each right must therefore give rise to an absolute minimum entitlement in the absence of which a State is to be considered in violation of its obligations.[381]

---

[375] Bilchitz 2003 *South African Journal on Human Rights* 11. McGraw also points out that "[t]he minimum core concept "essentially...posits that there are degrees of rights fulfilment, and that one of these degrees is a definable, basic threshold—or for our purposes, a minimum *legal* content— for socio-economic rights." See McGraw 2011 *Loyola University Chicago International Law Review* 131.

[376] See for example S Liebenberg "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?" (2002) 6 *Law, Democracy and Development* 159-161; P de Vos "The Essential Components of the Human Right to Adequate Housing—A South African Perspective" in D Brand & S Russel (eds) *Exploring the Core Content of Economic and Social Rights: South African and International Perspectives* (2002) 23 23-24. For a discussion of the minimum core concept see also Bilchitz 2003 *South African Journal on Human Rights* 1-26.

[377] In *Treatment Action Campaign*, *Grootboom* and *Mazibuko* cases the South African Constitutional Court has rejected the minimum core concept in assessing the State's compliance with the positive obligations imposed by the economic, social and cultural rights in sections 26 & 27 of the Constitution. For a comprehensive analysis of the minimum core debate in South Africa's socio-economic rights jurisprudence, see Liebenberg *Socio-Economic Rights* 148-151 & 163-173.

[378] Bilchitz 2003 *South African Journal on Human Rights* 2. For further discussion on the minimum core concept see also D Bilchitz "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance" (2002) 118 *South African Law Journal* 484-501.

[379] Bilchitz 2003 *South African Journal on Human Rights* 11.

[380] Sepulveda *Obligations* 366.

[381] Alston 1987 *Human Rights Quarterly* 352-353.

The failure to comply with the minimum essential level is a *prima facie* violation of the ICESCR and the burden of proof falls on the State to justify such situations.[382] Bilchitz then links it with progressive realisation, noting that

> "the notion of progressive realisation links these two interests: it recognises that what the government is required to do is to provide core services to everyone without delay that meet their survival needs and then qualitatively to increase these services so as ultimately to meet the maximal interests that the State is required to protect."[383]

In the *Grootboom,*[384] *Treatment Action Campaign*[385] and *Mazibuko*[386] cases, the South African Constitutional Court (hereinafter referred to as "the Court") declined to adopt the concept of the minimum core as model of review in assessing State compliance with the positive obligations imposed by sections 26 and 27 of the South African Constitution. In *Grootboom*, for instance, the Court pointed out that the determination of a minimum core in the context of the right to have access to adequate housing presents difficulties because there are people who need land, others need both land and houses yet others need financial assistance.[387] The Court further declined to adopt the minimum core obligation concept on the basis of its lack of adequate information in order to determine the content of the minimum core obligations.[388] This, according to the Court, should be contrasted with the CECSR which developed the content of the minimum core obligations on the basis of its extensive experience reviewing State reports under the ICESCR.[389]

The Court pointed out that the formulations of sections 26 and 27 of the South African Constitution did not provide for an unqualified obligation to the State to provide access to the rights enshrined in those provisions immediately and on demand.[390] Rather, the Court developed a model of reasonableness review for assessing State compliance with the positive duties imposed by socio-economic rights. The Court further pointed to the unrealistic demands imposed by the minimum

---

[382] Sepulveda *Obligations* 367.
[383] Bilchitz 2003 *South African Journal on Human Rights* 11.
[384] *Grootboom and Others v Government of the Republic of South Africa and Others* 2001 (1) SA 46 (CC).
[385] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC).
[386] *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).
[387] Para 33.
[388] Para 31.
[389] Para 31.
[390] *Grootboom* para 95; *TAC* para 32 & 35 and *Mazibuko* para 57.

core obligations on the State. The Court cited the impossibility to give everyone access even to a core service immediately.[391]

A number of scholars have also contested a model of review based on the concept of minimum core as better suited to the judicial review of positive socio-economic rights claims.[392] Kende has argued that the concept of minimum core obligations creates the danger that courts will transgress the boundaries of their institutional legitimacy and competency.[393] Through defining and enforcing minimum core obligations, courts may be tempted to usurp government's law-making functions.[394]

The minimum core concept has also been criticised due to its linkage to survival needs.[395] Liebenberg has argued that threats to life can be relatively short, medium or long term. The survival standard therefore does not provide clarity as to socio-economic interventions to enjoy prioritised consideration in policy-making and adjudication.[396] Liebenberg for instance points out that health education measures concerning the danger of smoking or the need for safe sex may not save lives in the short term, but may have a significant impact on long term mortality rates.[397] Liebenberg further argues that in its bid to establish clear and judicially manageable standards for the adjudication of socio-economic claims, there is a risk that the minimum core approach may encourage minimalism in social provisioning. This might prove to be problematic when the context may in fact "render such minimalism unnecessary and inappropriate."[398] Liebenberg has further criticised the minimum core on what she alleges to be its dependence on a two-tiered approach to the adjudication of socio-economic rights claims. This approach requires distinguishing between core needs and non-core needs. Liebenberg points out that socio-economic

[391] *TAC* para 32; *Grootboom* para 95 and *Mazibuko* paras 58 & 59.
[392] See Liebenberg *Socio-Economic Rights* 163-173; A Sachs "The Judicial Enforcement of Socio-Economic Rights" (2003) 56 *Current Legal Problems* 579-601; M Wesson "Grootboom and Beyond: Reassessing the Socio-Economic Rights Jurisprudence of the South African Constitutional Court" (2004) 20 *South African Journal of Human Rights* 284-308; MS Kende "The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to the Critics" (2003-2004) 19 *Connecticut Journal of International Law* 617-629; K Lehmann "In Defence of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core" (2006) 22 *American University International Law Review* 163-197.
[393] Kende 2003-2004 *Connecticut Journal of International Law* 624.
[394] Liebenberg *Socio-Economic Rights* 165.
[395] 168.
[396] 168.
[397] Liebenberg has argued that "the quest for an uncontested standard to guide prioritisation in the context of socio-economic rights is misplaced." See Liebenberg *Socio-Economic Rights* 168.
[398] 169.

needs are interconnected and there is no clear-cut distinction between core and non-core needs.[399] Wesson has also argued against the two-tier approach to the adjudication of positive duties imposed by socio-economic rights. This is because the strong prioritisation of core needs is likely to be counter-productive to the goals of longer-term development programmes.[400] Wesson argues that the effect of this adjudicative approach will be to encourage the diversion of State resources from longer term, and often more efficient investments to temporary, emergency-type measures.[401]

What is noteworthy is that opponents of the minimum core do not necessarily advocate for the rejection of the minimum core concept in its entirety. This is because the concept can play an important role in the evaluation of the reasonableness of the State's measures in realising socio-economic rights.[402] It can also help in ensuring that the urgent material needs of disadvantaged groups receive immediate attention.[403] The minimum core should not be exclusively grounded in the survival-based standard. Rather, it should accommodate other cardinal values such as participatory democracy, equality, freedom and human dignity.[404]

Liebenberg has pointed out that reasonableness has synergies with the approach of the CESCR to the interpretation of the obligations imposed upon States by article 2 of the ICESCR.[405] The CESCR has held that States parties to the ICESCR are under an obligation to take steps that are deliberate, concrete and targeted as clearly as possible towards fulfiling their obligations under the treaty.[406] Liebenberg has further pointed out that reasonableness review further approximates the description of obligations of conduct imposed by socio-economic rights elaborated by the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*.[407] According to the *Maastricht Guidelines*, an obligation of conduct requires action reasonably calculated to realise enjoyment of a right.[408] It is noteworthy that the standard of reasonableness review has also been explicitly

[399] 170.
[400] Wesson 2004 *South African Journal of Human Rights* 304.
[401] 304.
[402] Liebenberg *Socio-Economic Rights* 173.
[403] Young 2008 *Yale Journal of International Law* 172-174.
[404] Liebenberg *Socio-Economic Rights* 173.
[405] Liebenberg *Socio-Economic Rights* 151.
[406] CESCR *General Comment 3* (1990) para 2.
[407] Liebenberg *Socio-Economic Rights* 151.
[408] See Principle 7 of the Maastricht Guidelines.

incorporated in the Optional Protocol to the ICESCR.[409] This dissertation will not explore further the highly complex scholarly debate on the merits of adopting either the reasonableness or minimum core model of review as analysis of such a protracted issue is beyond the scope of this chapter. The minimum core concept and reasonableness review are not necessarily either/or concepts and that, as the Court itself acknowledged, the minimum core concept can be incorporated within the reasonableness model of review. The analysis in this dissertation will follow the methodology set out in General Comment No 3 regarding the minimum core concept and progressive realisation whilst acknowledging that the reasonableness model of review can incorporate a minimum core concept.[410]

---

[409] See art 8(4) to the Optional Protocol to the ICESCR (2008) UN Doc A/HRC/8/L.2. Art. 8(4) provides that "when examining communications under the present protocol, the Committee shall consider the reasonableness of the steps taken by the State party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State party may adopt a range of possible policy measures for the implementation of the rights set forth in this Covenant." The African Commission has also adopted an implicit standard of reasonableness review, reflected in its decision in *Purohit and Moore v The Gambia*, Communication no 241/2001 (2003). The case related to a challenge to the conditions under which mental patients were held in The Gambia under a mental healthcare piece of legislation, the Lunatics Detention Act of 1917. The African Commission held that the right to health in article 16 of the African Charter requires "the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind" (see para 80). The African Commission however acknowledged that millions of people in Africa are not currently enjoying the right to health maximally because of a lack of resources and the extent of poverty in many African countries. It further acknowledged the many other structural barriers extant in Africa that impede the full realisation of health rights (para 84).The African Commission thus interpreted article 16 as imposing an obligation on the State "to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind" (Para 84). Nevertheless, the African Commission ruled that The Gambia had violated the right to health in article 16 as well as the right "to special measures of protection" for the aged and disabled provided for under article 18(4)) by its failure to take sufficient steps over a long period of time to reform the relevant legislation and to improve the nature of healthcare given to mental health patients. The Inter-American system for the protection of human rights has also adopted, at least implicitly, the reasonableness approach. Melish, for instance, has pointed out that State jurisprudence from the Inter-American system appear to show that State responsibility arises not because a person or group of persons is objectively impaired in his or her factual enjoyment of a protected right. See Melish "The Inter-American Court of Human Rights" in *Social Rights Jurisprudence* 383. The Inter-American Court for instance regularly refers to the legal duty to take "reasonable" steps to ensure rights." (383) Rather, the responsibility of the State arises "because the State has failed to adopt the measures required of it in the particular circumstances to reasonably prevent the harm or to respond to it appropriately with "due diligence." *Velásquez Rodríguez v Honduras*, 29 July 1988, Series C, No 4 para 175. See also Melish "The Inter-American Court of Human Rights" in *Social Rights Jurisprudence* 383. In the *Pueblo Bello Massacre v Colombia* case, the Inter-American Court pointed out that the obligation to adopt measures is conditioned on "reasonable possibilities" of preventing or avoiding the noted harm. Where the State fails to take reasonable or appropriate measures in each of these categories it in a sense aids the abusive conduct at issue, thereby making the State responsible on the international plane. See *Pueblo Bello Massacre v Colombia*, 31 January 2006, *Series C*, No. 140, para 145.

[410] See Liebenberg *Socio-Economic Rights* 172-173 & 183-186. See also S Yeshanew "Combining the 'Minimum Core' and 'Reasonableness' Models of Reviewing Socio-Economic Rights" (2008) *9 ESR Review* 8 11.

As a model of review, the minimum core will help in defining the content of the rights, such as the right to water and providing a principled basis for the evaluation of State measures in the implementation of such a right. On the other hand, the reasonableness test provides a model for analysing and evaluating the nature of the State's obligations.[411] Such an approach is reflected by the Court in the *Grootboom* and *Treatment Action Campaign* cases in which it did not completely reject the minimum core model of review. Pointedly, the Court indicated that it might take the minimum core in its assessment of the reasonableness of the measures adopted by the State.[412] The combined model is a suitable one in that it combines both rights analysis and the evaluation of measures adopted by the State to realise socio-economic rights such as the right to water. Such an approach will also help in dissolving the false dichotomy between minimum core and reasonableness approaches, and possibly contribute towards a more creative development of the reasonableness review standard envisaged under article 8(4) of the OP to the ICESCR.

4 4 2 Minimum core State obligations imposed by the right to water

The CESCR has defined the minimum core of the rights to housing, food, education, health care and water and the obligations they impose.[413] McGraw has pointed out that the approach of the CESCR in each of these General Comments has been to place emphasis "on core State *obligations* more than the right's core *elements.*"[414] Such an approach has been criticised, particularly with regard to the right to water, given that this right is not expressly provided for in the ICESCR.[415] Core elements of a right should carry directly correlative core obligations.[416] The significance is that the relationship between the core content of a right and the core obligations could then

[411] 11-12.
[412] See *Grootboom*, para 33 and *Treatment Action Campaign,* para 34.
[413] See CESCR *General Comment 14* (2000) paras 43-44; United Nations Committee on Economic, Social and Cultural Rights *General Comment No 13 The Right to Education (art. 13)* (1999) UN Doc E/C.12/1999/10 para 57; United Nations Committee on Economic, Social and Cultural Rights *General Comment No 12 The Right to Adequate Food (art. 11)* (1999) UN Doc E/C.12/1999/5 para 8. For the right to housing, see United Nations Development Programme Human Development Report (2000) <available at http://hdr.undp.org/en/PDF> (accessed 20.10.2011).
[414] McGraw 2011 *Loyola University Chicago International Law Review* 134.
[415] See M Langford "Ambition That Overleaps Itself? A Response to Stephen Tully's 'Critique' of the General Comment on the Right to Water" (2006) 26 *Netherlands Quarterly on Human Rights* 433 458.
[416] A Cahill (2005) "The Human Right to Water - a Right of Unique Status: The Legal Status and Normative Content of the Right to Water" (2005) 9 *The International Journal of Human Rights* 389 399.

be clarified. Cahill notes that such an exercise could be used as an indicator as to whether there are any gaps in the guidelines provided by General Comment 15.[417] It is pertinent to note that human rights instruments do not differentiate between rights and obligations hence the "core elements of a right should carry directly correlative obligations."[418]

States have a general obligation to progressively realise the right to water.[419] States, however, have immediate obligations in relation to the right to water that are not subject to progressive realisation. These include the guarantee that the right will be exercised without discrimination and the obligation to take steps towards full realisation of the right.[420] These steps must be deliberate, concrete and targeted towards full realisation.[421] States must not take retrogressive measures in relation to the right to water.[422] General Comment 15 identifies a number of core obligations that States are enjoined to satisfy immediately. Core obligations are considered to be important in the sense that non-compliance with these obligations can have severe repercussions for disadvantaged and marginalised communities.[423]

The core content of the right to water is thus an entitlement to support basic water needs. According to Kiefer and Brolmann, the core obligation engendered by the right to water, at the minimum, entitles everyone to essential quantities of safe freshwater for personal and domestic uses in order to prevent dehydration and disease.[424] The CESCR thus appears to be adopting a survival-based approach in the deployment of the minimum core approach. The CESCR can refine its approach by adopting a minimum core approach that places human dignity at the forefront, for example, one's ability to wash oneself and one's clothes.[425] It therefore places a weighty burden of justification on the State in cases where people lack access to basic needs such as essential amounts of water for personal and domestic use. People are not likely to live a life of dignity and freedom when they fail to access basic needs.[426] The observations of the Court in the *Grootboom* case are equally

[417] 399.
[418] 399-400.
[419] Pejan 2004 *George Washington International Law Review* 1181 1186.
[420] CESCR *General Comment 15 (2002)* para 17.
[421] Para 17.
[422] Para 19.
[423] Pejan 2004 *George Washington International Law Review* 1188.
[424] T Kiefer & C Brolmann "Beyond State Sovereignty: The Human Right to Water" (2005) 5 *Non-State Actors & International Law* 183 201.
[425] See generally Liebenberg *Socio-Economic Rights* 184.
[426] 184.

valid in this case although uttered in the context of the right of access to housing. The Court noted that a "society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, equality and freedom."[427]

General Comment 15 outlines nine core State obligations engendered by the right to water. The State is obliged to ensure access to the minimum essential amount of safe water sufficient for personal and domestic uses to prevent disease.[428] Second, access must be enhanced in a non-discriminatory way in line with articles 2(2) and 3 of the ICESCR.[429] Additionally, States must take deliberate, concrete and targeted steps towards the full realisation of the right to water.[430] These include recognition of the right in national legislation and policies, the adoption and implementation of a national water strategy that addresses everyone's needs,[431] and the creation of a mechanism for water rights monitoring.[432] These obligations are not subject to the "progressive realisation" clause in ICESCR 2(1). It follows that a water privatisation process should not lead to the violation of the minimum threshold of the right to water. The State is under an immediate obligation to ensure that the core elements of the right to water articulated above are enjoyed by the population.[433] The following section discusses the immediate/progressive dichotomy as articulated by the CESCR as these obligations are applicable to the right to water.

4 4 3 Obligations of an immediate nature and progressive realisation

The ICESCR imposes obligations which are of immediate effect despite the progressive realisation clause.[434] The CESCR delineates obligations imposed by the ICESCR that are of an immediate nature, the obligations to take steps, and the obligation to guarantee rights without discrimination.[435] The right to water imposes on States immediate obligations, that is, obligations not subject to the progressive realisation clause. These include the obligation to guarantee that the right to water

[427] See *Grootboom* para 44.
[428] CESCR *General Comment 15* (2002) para 37(a).
[429] Para 37(b).
[430] Para 17.
[431] Para 37(f).
[432] Para 37(g).
[433] See FG Isa "Globalisation, Privatisation and Human Rights" in K de Feyter & FG Isa *Privatisation and Human Rights in the Age of Globalisation* 9 22.
[434] CESCR *General Comment 3* (1990) para 1.
[435] Para 2. See also CESCR *General Comment 15* (2002) paras 13-17.

will be exercised without discrimination of any kind.[436] Secondly, the State is obliged to take steps geared towards the full realisation of the right to water.[437] This may entail an element of progressivity to achieve full realisation, particularly in a case like South Africa given its apartheid past in which the black majority was excluded from access to essential services such as water. Thirdly, such steps taken must be deliberate, concrete and targeted toward the full realisation of the right to water.[438]

4 4 3 1 Obligation to take steps

Article 2(1) of the ICESCR obliges States to "take steps…by all appropriate means, including particularly the adoption of legislative" measures towards the full realisation of the guaranteed rights, including the right to water.[439] This obligation is of immediate effect and is not subject to limitation by any considerations.[440] The CESCR has elaborated on the scope of this obligation in its numerous general comments. The CESCR explained that while the ICESCR provides for progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. One of the obligations is the undertaking to guarantee that the relevant rights will be provided without discrimination and the other is the undertaking in article 2(1) of the ICESCR "to take steps."[441] Some of the steps that States are obliged to take are of an immediate nature.[442] Other steps may be taken over a period of time, being progressive in nature, particularly the largely positive obligations that may require significant resource implications.[443]

States are generally enjoined to adopt two types of measures, legislative and non-legislative measures. Legislative measures include the adoption of new legislation as well the reform, amendment and repeal of legislation inconsistent with the rights provided for in the ICESCR. The CESCR has for instance pointed out that the failure to adopt, implement, and monitor the effect of laws, policies and

[436] CESCR *General Comment 15* (2002) para 17.
[437] Para 17.
[438] Para 17.
[439] See CESCR *General Comment 3* (1990) paras 2-3.
[440] CESCR *General Comment 3* (1990) para 2; CESCR *General Comment 13* (1999) para 43; CESCR *General Comment 14* (2000) para 30 and CESCR *General Comment 15* (2002) para 17. See also the Limburg Principles para 16 which states that "all State parties have an obligation to begin immediately to take steps toward full realisation of the rights contained in the Covenant."
[441] See CESCR *General Comment 3* (1990) para 2.
[442] General Comment 3 para 2. For further discussion, see S Joseph & A McBeth *Research Handbook in International Human Rights* (2010) 44.
[443] 44.

programmes to eliminate *de jure* and *de facto* discrimination with respect to each of the rights in the ICESCR constitutes a violation of the rights in question.[444] A sound legislative foundation provides a firm basis for the protection and provision of such rights as well as their enforcement in the event of infringement.

In relation to the right to water, States parties have immediate obligations, such as the guarantee that the right will be exercised without discrimination. Significantly, States are further obliged to take deliberate, concrete and targeted steps geared towards the full realisation of the right to water.[445] A State cannot therefore wait indefinitely to take steps. It is obliged to move as expeditiously and effectively as possible towards the ultimate objective of full realisation of the right to water in respect of everyone within its jurisdiction.[446] The obligation to take steps imposes on the State an obligation to adopt a national strategy or plan of action to realise the right.[447] The formulation of such a strategy must be based on all aspects of the right to water and the corresponding obligations of States.[448] Furthermore, the strategy must set targets to be achieved and provide for the corresponding time-frames for their achievement. It is also significant that the strategy should also establish institutional responsibility for the process, identify the necessary resources available to attain the objectives and allocate resources appropriately.[449] Accountability mechanisms must be established to ensure the proper implementation of the strategy.[450]

4 4 3 2 Non-discrimination

Prohibition against discrimination is a cardinal principle under international human rights law.[451] The principle of non-discrimination is enshrined in the UN Charter,[452] the UDHR[453], the ICCPR[454]and the CRC.[455] Article 2 of the ICESCR provides for a non-discrimination clause whose principles are applicable to all the rights contained

[444] CESCR *General Comment 16* (2005) para 14.
[445] CESCR *General Comment 15* (2002) para 17.
[446] Para 18.
[447] Para 47.
[448] Para 47.
[449] Para 47.
[450] Para 47.
[451] Sepulveda *Obligations* 381.
[452] See articles 1(3), 13(1)(b), 55(c) and 76.
[453] See articles 2 & 7.
[454] See articles 2(1) and 26.
[455] See article 2.

in the treaty, including the right to water.[456] Specialist instruments such as ICERD,[457] CEDAW,[458] the Disabilities Convention[459] and the Convention on the Protection of All Migrant Workers and Members of their Families[460] are aimed at addressing specific prohibited grounds of discrimination.

The principle of non-discrimination is of great importance to the ICESCR such that the CESCR has explicitly stated that "the philosophy of the Covenant is based on the principle of non-discrimination and the idea of universality of human rights."[461] The CESCR has for instance, emphasised that the guarantees of equality and non-discrimination entrenched in the ICESCR should be interpreted in ways which facilitate the full protection of economic, social and cultural rights.[462] The ICESCR thus describes discrimination as any distinction based on certain proscribed grounds whose effect is to impair enjoyment by all persons of all the rights protected in the ICESCR.[463]

States are obliged to take steps to remove any *de jure* and *de facto* discrimination whose effect is to deprive individuals and groups of the means or entitlements necessary for the realisation of the right to water.[464] This duty necessarily enjoins States to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination in access to water services.[465] This is particularly pertinent in times of severe resource constraints where vulnerable members of society would be disproportionately affected by such lack of access. Special focus should be on vulnerable groups such as women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees.[466] Non-discrimination in access to water is one of the core obligations imposed by the right to water on States. States are particularly obliged to ensure access to water and

[456] This dissertation will not embark on a detailed study of equality or non discrimination as such an analysis is beyond the scope of this research.
[457] International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (1969)
[458] Convention on the Elimination of All Forms of Discrimination Against Women UN Doc A/34/46 (1979).
[459] UN Doc A/61/49 (2006), articles 4 & 5.
[460] Article 25.
[461] See Committee on Economic, Social and Cultural Rights *Concluding Observations Algeria* (1996) UN Doc E/1996/22 para 293.
[462] General Comment 9 (1998) para 15.
[463] Sepulveda *Obligations* 383.
[464] Para 14.
[465] Para 15.
[466] Para 16(a)-(h).

water facilities and services on a non-discriminatory basis, especially for disadvantaged and marginalised groups.[467] It follows that discriminatory or unaffordable increases in the price of water constitutes a violation of the right to water.[468]

The immediate character of non-discrimination with regard to the right to water as elaborated by the CESCR in General Comment 15 must be understood to impose obligations on the State to desist from enforcing any discriminatory practises and the treatment of individuals and groups without discrimination in accessing water.[469] Additionally, a State must take steps to eliminate *de facto* discrimination with regard to water access as soon as possible.[470] This implies in the context of water privatisation that a State has a special obligation to provide water and water facilities and any other appropriate intervention mechanisms to those who lack access. The State is further obliged to review its national laws with a view to assessing the existence of any discriminatory impact. The State must either amend or repeal any legislation whose impact might be to curtail access to water by individuals or groups within society.[471] Most significantly, the State is obliged to take legislative measures to combat discrimination in access to water.[472]

The concept of progressive realisation with respect to socio-economic rights, including the right to water has engendered considerable debate and, occasionally, jurisprudential confusion as to the nature and extent of obligations imposed by such rights. The following section explores the concept of progressive realisation as formulated by the CESCR, academic literature and where necessary, case law in respect of the right to water.

4 4 4 Progressive realisation

The concept of progressive realisation is a reflection of the resource-dependant nature of State obligations in relation to socio-economic rights such as the right to water. It also reflects the complexity of access to socio-economic rights given entrenched structural patterns of the economy and systematic disadvantage. South

[467] Para 37(b).
[468] Para 44 (a).
[469] Para 13.
[470] Para 14.
[471] United Nations Committee on Economic, Social and Cultural Rights *General Comment No1, Reporting by States Parties* (1989) UN Doc E/1989/22 1 para 2.
[472] See CESCR *General Comment 3* (1990) para 3.

Africa is a case in point where, as a result of apartheid policies, the black majority was subjected to systemic deprivation and discrimination in accessing basic services such as water, healthcare, housing, food, education and social security.[473] Article 2(1) of the ICESCR enjoins States to take the necessary steps towards "achieving progressively the full realisation of the rights recognised in [the ICESCR]." The CESCR has pointed out that progressive realisation constitutes acknowledgement that the full enjoyment of socio-economic rights will generally not be able to be achieved in a short period of time.[474] This can be contrasted with the wording of the ICCPR, which clearly imposes immediate obligations on States parties to the ICCPR. The ICCPR enjoins States to "respect and ensure" the rights recognised in that instrument.[475] It is significant, however, not to overstate the difference between the civil and political rights enshrined in the ICCPR and the economic, social and cultural rights contained in the ICESCR. Alston and Quinn have contended that civil and political rights also require heavy investment in institutions and the availability of resources for their full realisation. The suggestion that realisation of civil and political rights requires only non-interference on the part of the State and can be achieved without significant expenditure is not accurate.[476]

Craven has pointed to concerns raised during the drafting of the ICESCR that reference to progressive realisation would allow States to postpone full enjoyment of the rights indefinitely or entirely avoid their obligations.[477] However, it was argued that the implementation of the rights provided for in the ICESCR should be vigorously pursued so that full realisation could be achieved as quickly as possible.[478] These concerns have been reflected in General Comment 3 where it states that:

> "Nevertheless, the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of

[473] See Liebenberg *Socio-Economic Rights* xxi.
[474] CESCR *General Comment 3* (1990) para 9.
[475] See article 2(1) of the ICCPR.
[476] P Alston & G Quinn "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 156 172.
[477] Craven *The International Covenant* 130-131.
[478] 131.

> the Covenant which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal."[479]

Alston and Quinn have pointed out that the concept of progressive realisation is key to an understanding of the nature of States' obligations.[480] If not carefully construed and applied, the concept of progressive realisation in the fulfilment of socio-economic rights is capable of depriving State obligations of any normative significance.[481] Although it would appear that the implementation of the rights contained in the ICCPR is to be undertaken at the earliest possible moment, the same obligation can be said regarding the implementation of the rights contained in the ICESCR, notwithstanding the progressive realisation clause.[482] It is clear from the wording of article 2(1) of the ICESCR that the chief constraint upon the immediate realisation of the rights will be the lack of resources.[483]

States may therefore not delay in their efforts to realise the right to water. They are obligated to adopt a course of action which would achieve that objective in the shortest possible time.[484] Thus, the fact that a State is unable to ensure the full realisation of the right to water in the short term does not absolve it from taking immediate steps to extend urgent relief to those lacking access to essential amounts of water. Admittedly, some dimensions of socio-economic rights may involve progressive realisation to a greater extent than civil and political rights. It is pertinent to note that in most democratic systems, the State has already invested in the infrastructure such as judicial institutions and electoral systems necessary to guarantee and protect civil and political rights.[485] This should be contrasted with the distribution of welfare and other socio-economic benefits where private institutions such as the market and family have been deployed to provide them.[486] This necessitates the imposition of an obligation on the State to ensure that everyone has access to socio-economic rights such as water. Inevitably, this will necessitate a

---

[479] See CESCR *General Comment No 3* (1990) para 9.
[480] Alston & Quinn 1987 *Human Rights Quarterly* 172.
[481] 172.
[482] Craven *The International Covenant* 130.
[483] 132.
[484] 131.
[485] See Liebenberg *Socio-Economic Rights* 191.
[486] 191.

degree of State intervention which has significant implications, both for resource distributions and policy decisions.[487]

Full realisation of all human rights requires States to develop policies which progressively ensure the realisation of the relevant rights.[488] This does not imply that States have unfettered discretion to do as they please when it comes to the fulfilment of socio-economic rights under the ICESCR.[489] In the *Grootboom* case, for instance, the Court interpreted progressive realisation to mean the dismantling of a range of legal, administrative operational and financial obstacles which impede access to the rights. The minimum core obligations discussed above places a strong obligation on the State to ensure that everyone has access to basic levels of water. Progressive realisation of the right to water in this context should therefore be understood as enjoining the State to gradually improve the quality of water access until the goal of full realisation of the right to water is achieved. Bilchitz has explained this approach in the context of the right to adequate housing in the South African Constitution, arguing that:

> "Progressive realisation involves an improvement in the adequacy of housing for the meeting of human interests. It does not mean some receive housing now, and others receive it later; rather, it means that each is entitled as a matter of priority to basic housing provision, which the government is required to improve gradually over time."[490]

It follows that a State's lack of capacity to ensure the full realisation of the right to water in the short term, would not absolve it from the obligation to take immediate steps to provide relief, particularly to those in urgent need of water to foreclose the infliction of irreparable harm.[491] Liebenberg further points out that in the case of pressing resource constraints in the provision of basic services such as water, it is important that the needs of marginalised and disadvantaged groups should receive particular attention.[492] Progressive realisation, according to Liebenberg, must be

[487] 191.
[488] 129.
[489] E Riedel "Economic, Social and Cultural Rights" in C Krause & M Scheinin *International Protection of Human Rights: A Textbook* (2009) 129 129.
[490] D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 193.
[491] See Liebenberg *Socio-Economic Rights* 187.
[492] 188.

understood to entail the State's obligation to improve the nature and quality of the services to which people have access.[493] This means that the standard of socio-economic goods and services provided should be adequate, sufficient and acceptable.

Progressive realisation, it must be noted, can also assist a claimant to establish the unreasonableness of a State's acts or omission where a State has not taken timely or effective steps in realising the right to water.[494] The concept of progressive realisation must therefore be read in light of the objective of the ICESCR, which is to establish clear obligations for States to take steps towards full realisation of socio-economic rights such as the right to water.[495] It was pointed out in chapter 3[496] that privatisation does not relieve the State of its legal responsibility under international human rights law to realise the right to water.[497] The States are the primary duty bearers under the international human rights system.[498] A State has an obligation to prevent third parties from threatening access to equal, affordable, sufficient, safe and acceptable water.[499] States are therefore obliged to accord the minimum amount of free water to those who lack the resources to pay for their water needs for personal and domestic uses.[500] This means the State, regardless of privatisation of water services, must adopt intervention measures such as the use of a range of appropriate low-cost technologies, appropriate pricing policies such as free or low-cost water and income supplements,[501] subsidies, and other related measures in favour of disadvantaged groups.[502]

It necessarily follows that States do not relinquish their international human rights obligations to progressively realise the right to water by privatising the delivery of water services. Rather, the State must move "as expeditiously and effectively as possible" towards the full realisation of the right to water.[503] The CESCR envisages possible collaboration between the State and private actors in the operationalisation

[493] Liebenberg *Socio-Economic Rights* 188.
[494] 189.
[495] General Comment 3 (1990) para 9.
[496] See section 3 6, chapter 3.
[497] Vandenhole & Wilders 2008 *Netherlands Quarterly of Human Rights* 409-410.
[498] See section 3 6, chapter 3.
[499] CESCR *General Comment No 15* (2002) para 24.
[500] Para 12(c)(ii).
[501] Para 27.
[502] See Chirwa 2004 *African Human Rights Law Journal* 241.
[503] CESCR *General Comment 3* (1990) para 9.

of a water strategy geared towards the progressive realisation of the right to water.[504] Furthermore, a State should ensure that it continues to exercise adequate oversight in order to meet its obligation to realise the right to water when it engages non-State actors to manage and supply water services. Privatisation of water services should therefore not result in the State neglecting its duty to progressively realise the right to water. The following section discusses the concept of retrogressive measures in relation to the right to water.

4 4 5 Retrogressive measures

The CESCR has held that the principle of progressive realisation entails a presumption against States against adopting retrogressive measures which have the effect of restricting or limiting access to socio-economic rights guaranteed under the ICESCR.[505] Retrogressive measures are deemed to be breaches of the duty of progressive realisation unless the State can show that such impugned measures were justified.[506]

Under international human rights law, a retrogressive measure in respect of the right to water entails a diminution in the level of protection accorded to the right which is the consequence of an intentional decision by the State.[507] For example, an ill-conceived water privatisation policy which results in arbitrary and exorbitant water tariffs disproportionately affecting disadvantaged groups will amount to an impermissible retrogressive measure. Judicial decisions annulling legislation enacted to operationalise the right to water or the repeal or suspension of legislation necessary for the continued enjoyment of the right to water would amount to a retrogressive measure. Additionally, the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to water, for example, adoption of privatisation and liberalisation policies resulting in the price of water being unaffordable would amount to retrogressive measures.[508]

---

[504] CESCR *General Comment 15* (2002) para 50.
[505] See CESCR *General Comment 3* (1990) para 9; CESCR *General Comment 13* (1999) para 45; CESCR *General Comment 14* (2000) para 32; CESCR *General Comment 15* (2002) para 17 and The Maastricht Guidelines, Guideline 14(e).
[506] See International Commission of Jurists *Courts and the Legal Enforcement of Economic, Social and Cultural Rights* (2008) 30.
[507] Sepulveda *Obligations* 323.
[508] See CESCR *General Comment 15* (2002) para 42.

Although international human rights law anticipates that a State might embrace measures whose effect may be to negatively impact on the right to water, the CESCR has commented that retrogressive measures would need to be fully justified. Retrogressive measures can only be resorted to taking into account all the rights protected in the ICESCR "in the context of the full use of the maximum available resources."[509]

The CESCR and other treaty bodies have highlighted certain circumstances in which retrogressive measures may be justified. Retrogressive measures may be justifiable where a State is experiencing an economic crisis with the result that, even by utilising the maximum available resources, a deterioration of the situation is inevitable.[510] Retrogressive measures may also be justifiable where a State can show that such measures are necessary to achieve equity in the realisation of the right or provide a more sustainable basis for the adequate realisation of the right to water.[511] The Maastricht Guidelines also provide for the legal permissibility of retrogressive measures where the State is acting within a limitation permitted by the ICESCR, such as lack of available resources or *force majeure*.[512]

The CESCR's approach that retrogressive measures require particular justification creates the basis for challenging the withdrawal of social programmes through, for example, such activities as full cost recovery associated with water privatisation. Such measures will be particularly susceptible to challenge should they result in the diminution of the quality and quantity of available water. In this vein, the Maastricht Guidelines provide that weighty justifications are required where retrogressive measures result in marginalised groups being denied access to basic socio-economic rights such as water.[513] Privatisation of water services should therefore not result in the deterioration of the quality and quantity of water available to the population unless this can be strongly justified in relation to other socio-economic rights. The obligation of non-retrogression also means that States have to be particularly careful that policies such as economic liberalisation, intellectual

[509] CESCR *General Comment 3* (1990) para 9.
[510] Craven *International Covenant* 132.
[511] Liebenberg *Socio-Economic Rights* 190. See also *Five Pensioners Case, Judgment of February 28, 2003, Inter-Am. Ct. H.R (Ser C) No 98* (2003).
[512] See Maastricht Guidelines para 14(f).
[513] Liebenberg *Socio-Economic Rights* 190.

property regimes and bilateral investment agreements that it enters into do not impede its capacity to provide socio-economic rights such as water.[514]

The ICESCR imposes an obligation on the States to take steps, to the maximum of its available resources, towards realisation of the right to water. This concept has also been subject to sustained commentary in the academic literature and treaty monitoring bodies such as the CESCR. National courts have had to contend with this issue in a number of socio-economic rights cases. The following section turns to a discussion of this concept due to its significance in the determination of State duties towards realisation of the right to water.

4 4 6 "To the maximum of its available resources"

The availability of resources for the fulfilment of socio-economic rights such as water is one of the contentious issues pervading the provisions of the ICESCR. There are many provisions in other universal and regional human rights instruments such as the ICCPR that are resource-dependant, for example, the provision of institutions of law enforcement and judicial guarantees.[515] International human rights instruments, consistent with the principles of subsidiarity, fully respect States' margin of appreciation to adopt whatever measures a State considers the most appropriate for the realisation of the right water. Nevertheless in so doing, States must take deliberate, concrete and targeted steps within a reasonably short time towards the full realisation of the right to water.[516]

The "availability of resources" provision, though an important qualifier to the obligations to take steps, does not alter the immediacy of that obligation. One of the key challenges of adjudicating socio-economic rights claims such as access to water is where the resource implications of the claim are extensive and provision has not been made for such expenditure within existing budgetary provisions.[517] This raises the question as to whether an adjudicatory body is confined to scrutinising existing

[514] See Isa "Globalisation" in *Privatisation and Human Rights* 23.
[515] Riedel "Economic, Social and Cultural Rights" in *International Protection of Human Rights* 137. The CESCR has also expressed its views in its General Comment 3 (1990) as well as in a statement "Evaluation of the Obligations to Take Steps to the Maximum of Available Resources Under the Optional Protocol" in May 2007, during the debates of an Open-Ended Working Group of the Human Rights Council on the elaboration of an Optional Protocol to the ICESCR. See United Nations Committee on Economic, Social and Cultural Rights *An Evaluation of the Obligations to Take Steps to the Maximum of Available Resources under an Optional Protocol to the Covenant* (2007) UN Doc E/C.12/2007/1.
[516] See CESCR *An Evaluation of the Obligations to Take Steps* (2007) para 3.
[517] Liebenberg *Socio-Economic Rights* 192

budgetary allocations for water services or whether it can scrutinise the State's budgetary or macro-economic policies more broadly. In a domestic constitutional context, this gives rise to considerations regarding courts' institutional capacity and capability to make such determinations.[518]

The CESCR has interpreted the phrase "to the maximum available resources" contained in article 2 of the ICESCR as entailing resources existing within a State as well as those available from the international community.[519] The CESCR's position is to place great importance on transparent and participative decision-making processes at the domestic level in its assessment of whether a State has taken reasonable steps to the maximum of its available resources to achieve progressively the realisation of the right of access to socio-economic rights such as water.[520] The CESCR has further stated that in its assessment of communications brought to it under the Optional Protocol to the ICESCR, other considerations that it will take into account in its evaluation of justifiability of resource constraints include:

> "(a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
>
> (b) whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;
>
> (c) whether the State party's decision (not) to allocate available resources is in accordance with international human rights standards;
>
> (d) where several policy options are available, whether the State party adopts the one that least restricts Covenant rights;
>
> (e) the time frame in which the steps were taken;
>
> (f) whether the steps had taken into account the precarious situation of disadvantaged and marginalised individuals or groups and, whether they were non-discriminatory, and whether they prioritised grave situations or situations of risk.[521]"

Such considerations can offer useful guidance in assessing a State's reliance on resource constraints justifications for the non-fulfilment of its obligations to realise

[518] 192.
[519] See CESCR *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources"* para 5.
[520] Para 5.
[521] Para 8.

the right to water for those within its jurisdiction. The State should therefore be in a position to show that its policies and resource allocation decisions are predicated on a carefully reasoned consideration[522] of obligations imposed by the right to water. As noted by Liebenberg:

> "The burden of adducing evidence regarding the availability of resources, distributive decisions, and the overall onus of proof in respect of the defence of resource constraints should rest on the State as this information is squarely within its own sphere of knowledge and expertise."[523]

The CESCR has pointed out that a State is obliged to monitor and adopt remedial plans and strategies pertaining to the realisation of socio-economic rights even in circumstances of severe resources constraints.[524] This is particularly the case if the resource in question constitutes a basic social need such as access to water. The denial of basic access to water has a severe impact particularly on disadvantaged and marginalised members of society. This should trigger heightened scrutiny of the State's resource-based justifications for such lack of access. Where a State is not in a position to ensure the full realisation of the right to water in light of its available resources, it is nevertheless enjoined to show that it has allocated a appropriate resources for the provision of short-term relief for those whose needs are urgent.[525] Such an approach is in line with some of the good practices in relation to operationalisation of the right to water discussed in chapter 6.[526]

Jurisprudence from national jurisdictions could also be helpful in the interpretation of the "to the maximum of available resources" provision. The Court's jurisprudence, for instance, shows that orders with clear budgetary and resource implications will be made in situations where the State does not place sufficient evidence before the court demonstrating that it lacks available resources or has other competing urgent claims on its available resources.[527] The CESCR has pointed out that resource constraints alone do not justify inaction. In General Comment 3, the CESCR has pointed out that even under circumstances of limited resources, the

[522] Liebenberg *Socio-Economic Rights* 197.
[523] 197.
[524] CESCR *General Comment 3* (1990) para 11.
[525] 197.
[526] See sections 6 3 – 6 6, chapter 6.
[527] See also T Roux "Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court" (2003) 10 *Democratisation* 92-111 for analysis of the South African Constitutional Court's approach to the issue of resource allocations.

State is obliged to ensure the widest possible enjoyment of socio-economic rights such as the right to water, even where the available resources are demonstrably inadequate.[528] Most fundamentally, the State must make serious effort to provide the necessary minimum protection particularly for the most vulnerable and disadvantaged members of society. In that regard, a State must justify any measures it has pursued to ameliorate the situation of marginalised and disadvantaged members of society.[529]

Where a State can show that it lacks the requisite resources to fulfill the elementary requirements of rights such as the provision of a minimum amount of water, it still remains under a duty to seek international cooperation and assistance under article 2(1) of the ICESCR. The ECSR, for instance, has stated that:

> "When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allow it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for other persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional failure."[530]

The ECSR held that France had failed to achieve sufficient progress in advancing the provision of education for persons with autism. It was therefore in violation of the Revised Charter[531] not because of its failure to achieve a particular result, but because it had not proven that it had adopted measures to the maximum extent of its available resources in order to address, as a matter of priority, the situation of vulnerable groups such as persons with disabilities.[532] This decision of the ECSR shows how the requirement of non-discrimination may provide an important benchmark in evaluating the State's resource allocation priorities by identifying certain categories of individuals and groups who may require special

[528] CESCR *General Comment 3* (1990) para 10.
[529] Para 10.
[530] *International Association Autism Europe (IAAE) v France*, Complaint no 13/2002, decision on the merits of 4 November 2003 para 53. The Committee was clearly inspired by the approach adopted by the CESCR with respect to the obligations of the Covenant on ESCR which are to be progressively realised.
[531] Revised European Social Charter (1996) ETS No 163.
[532] *International Association Autism Europe (IAAE) v France* para 54.

attention. A case in point is Black people in South Africa who were subjected to systemic deprivation, and discrimination in their access to socio-economic needs such as water, healthcare, food, housing, social security and education because of apartheid policies.[533]

4 4 7 Conclusion

The idea of minimum core obligations has been defined in respect of the rights to housing, food, education, healthcare, water and social security. The preceding section showed that minimum core obligations advance a baseline of socio-economic protection across varied economic policies and vastly different levels of resource endowment. The State's non-compliance with core obligations can have severe repercussions for disadvantaged and marginalised communities. It was shown that, even where a State has privatised its water delivery services, it remains responsible for the satisfaction of a minimum amount of water, particularly to satisfy the water needs of disadvantaged and marginalised communities. As indicated in the discussion above, privatisation does not relieve the State of its obligation to ensure that minimum essential levels of each right are enjoyed by individuals, particularly the most vulnerable and disadvantaged groups within society.

The preceding section further showed that the right to water imposes on States immediate obligations, that is, obligations not subject to the progressive realisation clause. These include the obligations to take steps and to guarantee that the right to water will be exercised without discrimination of any kind. The section above showed that neither of the two obligations requires substantial resources to fulfil. The immediate character of the obligations to take steps and to ensure non-discrimination in respect of the right to water enjoins the State to take steps geared towards full realisation of the right. The State must also abstain from denying or limiting access for all persons within its jurisdiction to the enjoyment of the right to water.

The concept of progressive realisation in respect of the right to water was also discussed and it was shown that this notion is a reflection of the resource contingent nature of State obligations in relation to socio-economic rights such as the right to water. However, it was argued that progressive realisation of the right to water should not be used as an escape clause. States do not have unfettered discretion to do as

[533] Liebenberg *Socio-Economic Rights* xxi.

they please when it comes to the fulfilment of the right to water. Rather, a State has an obligation to gradually improve the quality of water to which people have access to until the goal of full realisation of the right to water is achieved.

Although international human rights law anticipates that a State might adopt measures that have a negative impact on the enjoyment of the right to water, the preceding section showed that such retrogressive measures would need to be fully justified. Programmes such as privatisation of water services should not result in the deterioration of the quality and quantity of water available to the population unless this can be strongly justified in relation to other socio-economic rights.

The discussion above showed that the principle of subsidiarity fully respects a States' margin of appreciation to measures it considers the most appropriate for the realisation of the right of access to water. Nevertheless in so doing, a State is obliged to take deliberate, concrete and targeted steps within a reasonably short time towards the full realisation of the right to water. If resource constraints render it impossible for a State party to comply fully with its obligations imposed by the right to water, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy the minimum core of the right. It was argued in the preceding section that a State that is unwilling to use the maximum of its available resources for the realisation socio-economic rights such as the right to water will be in violation of its obligations imposed by the right to water. This is particularly the case where the State would have exercised its discretion in a discriminatory and arbitrary manner. The following section analyses select jurisprudence from national courts to assess how the right to water has been judicially enforced. Particular attention is paid to how judicial organs have enforced the right to water.

4 5 National jurisprudence on the right to water

A considerable body of jurisprudence in which a wide range of issues relevant to the realisation of right to water have been adjudicated upon has now been developed. These have ranged from lack of access to water, forced eviction away from water sources, disconnection of water supply services for non-payment, installation of prepayment water meters and pollution of water sources. This section will discuss select cases from national jurisdictions, focusing on South Africa, India and

Argentina. The section will also discuss a landmark judgment handed down by the Botswana Court of Appeal, the *Mosetlhanyane and others v Attorney General of Botswana case* (hereinafter referred to as "*Mosetlhanyane"*).[534] The latter case is very important in so far as the court creatively protected the right to water by relying on a civil and political right as well as international law in enforcing the right to water. The selected countries, apart from Botswana, have generated considerable jurisprudence in the area of socio-economic rights in general and the right to water in particular. Additionally, South Africa is one of the few countries that has explicitly enshrined the right to water as a justiciable right in its Bill of Rights. Although Argentina has not explicitly provided for a right to water in its legal framework, it has nevertheless incorporated many of the international human rights instruments in its constitution, including the ICESCR. Additionally, as will be shown below, Argentinean courts have interpreted the right to a healthy environment to protect water related rights. Indian jurisprudence on the right to life and the right to a healthy environment has been innovative in terms of protecting socio-economic rights including the right to water.

4 5 1 South Africa

4 5 1 1 *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*

The decision of the South Guateng High Court (formerly the Witwatersrand Local Division) in *Residents of Bon Vista Mansions* v *Southern Metropolitan Local Council*[535] (hereinafter referred to as "Residents of Bon Vista") is significant as it was the first case under the South African socio-economic rights jurisprudence to confirm that the right of access to sufficient water guaranteed under the South African Constitution must be respected by all organs of State.[536] According to the court, the right to respect implies that people may not be denied access to water without being given a genuine opportunity to make representations. Most significantly, the obligation also entails that a person may not be denied basic water services where

[534] *Mosetlhanyane and others v Attorney General of Botswana*, Civil Appeal No CACLB-074-10.
[535] *Residents of Bon Vista Mansions* v *Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W).
[536] Para 12. For an analysis of the *Bon Vista case*, see A du Plessis "A Government Deep in Water? Some Thoughts on the State's Duties in Relation to Water Arising from South Africa's Bill of Rights" 2010 (19) *Review of European Community & International Environmental Law* 136 327 & A Welch "Obligations of State and Non-State Actors Regarding the Human Right to Water Under the South African Constitution" (2005) 5 *Sustainable Development Law & Policy* 58-64.

that person can prove to the satisfaction of the relevant water authority their inability to pay.[537]

In the *Residents of Bon Vista* case, a municipality in Johannesburg had disconnected the water supply to a block of flats resulting in the applicant launching an urgent application for interim relief to order the municipality to restore the water supply.[538] The court relied on section 4(3) of the Water Services Act, noting that water supply may not be discontinued if it would result in a person being subjected to denial of access to basic water services for non-payment. This is particularly so if the person subjected to the disconnection, has proved, to the satisfaction of the relevant water services authority his inability to pay for basic water services.[539]

The court considered section 4 of the Water Services Act which enjoins a water service provider to set conditions on the circumstances in which water services may be discontinued, and the procedures for discontinuing water services. The court also took into account section 27(1)(b) of the Constitution which enshrines the right of access to water and section 7(2) which obligates the State to respect, protect, promote and fulfill the rights in the Bill of Rights. The court held that if a municipality disconnects an existing water supply to consumers, this is *prima facie* a breach of its constitutional duty to respect the right of (existing) access to water, and requires constitutional justification in terms of the general limitations clause entrenched in section 36 of the South African Constitution.[540]

The court noted that the municipality had not complied with the conditions and procedures set out in section 4(3) of the Water Services Act. For any termination of water services to comply with the legal regime, the procedures have to be fair and equitable. Such procedures must provide for reasonable notice for termination of supply, and for an opportunity to make representations. Additionally, the disconnection procedures should not result in a person being denied access to basic water services for non-payment where that person has proved, to the satisfaction of the water services provider that he or she was unable to pay for basic services.[541]

It is pertinent to note that in the *Residents of Bon Vista* case, access to water existed before the municipality disconnected the supply. The court found that

[537] See *Bon Vista* para 26.
[538] Para 10.
[539] Para 26.
[540] See paras 16-20 & 27.
[541] See para 27 where the court discusses the procedural safeguards provided for under the Water Services Act.

disconnecting the water supply was *prima facie* in breach of the local authority's constitutional duty to respect the right of access to sufficient water, in that it deprived the residents of existing access. This placed an onus on the municipality to justify the breach.[542] The court was convinced that the *Bon Vista* residents had shown a *prima facie* right to a continuing water supply, which right was being infringed.

The *Residents of Bon Vista* case also illustrates the State's duty to respect the right of access to water, particularly in the case of interference with existing access. Even though the local authority was justified in disconnecting the water supply service, it failed to comply with the minimum statutory requirements of notice and availing the water users an opportunity to make representations before any disconnection. This denied the applicants an opportunity to make representations for the purposes of proving, to the satisfaction of the water services provider, should their circumstances were such that they were unable to pay for their water supply. In that case, the water service provider was obliged to refrain from terminating the service in terms of section 4 of the Water Services Act.

The approach adopted in this case is consistent with international law in that a State is prohibited from carrying out unjustified disconnection or exclusion from water services.[543] Additionally, the human right to water imposes a duty on States to provide water or water facilities to those who cannot afford through their own means.[544] The State has a core obligation to ensure access to the minimum essential amount of water for personal and domestic uses to prevent disease.[545]

4 5 1 2 *Manqele v Durban Transitional Metropolitan Council*

In *Manqele v Durban Transitional Metropolitan Council* [546] the applicant, who occupied premises with seven children, had her water supply disconnected due to the non-payment of her water account. She sought a declaratory order that the discontinuation of water services to her premises was unlawful. She claimed that the disconnection was unlawful in that it resulted in her being denied access to basic

[542] Para 20.
[543] The CESCR has explained that:
> "Violations of the obligation to respect follow from the State party's interference with the right to water. This includes, inter alia: (i) arbitrary or unjustified disconnection or exclusion from water services or facilities; (ii) discriminatory or unaffordable increases in the price of water; and (iii) pollution and diminution of water resources affecting human health." See CECSR *General Comment 15* (2002) para 44(a).

[544] General Comment 15 (2002) para 15
[545] Para 37(a).
[546] *Manqele v Durban Transitional Metropolitan Council* 2002 (6) SA 423 (D).

services, even though she was unable to pay for these.[547] She relied on section 3(1) of the Water Services Act, but not specifically on her constitutional right of access to water protected in section 27(1)(b) of the Constitution.[548] The former Durban High Court (now KwaZulu Natal High Court, Durban) held that the right to water as included in the Water Services Act was at that point incomplete and therefore unenforceable. The local authority successfully argued that as no regulations had at that time been promulgated to give meaning to the right to a basic water supply, the right the applicant relied on had no content.

It is important to note that the Regulations[549] which defined the term "basic water supply" and set up the basic water supply of 25 litres per day per person or six kilolitres per household per month had not yet been promulgated at the time. Therefore, the court concluded that it had no guidance from the legislature or government on how to interpret the right of access to water embodied in section 3 of the Water Services Act. The court pointed out that these were policy matters that are linked to the availability of resources and thus outside the court's remit.[550] Although the applicant argued that the provision of the Water Services Act must be understood in a way to at least fulfill the constitutional obligation imposed by section 27 the court did not accede to this contention, holding that a case based on a violation of a constitutional right must be made properly and set up in the founding papers.[551]

The local authority's act clearly constituted a breach of the duty to respect as provided for under section 7(2) of the South African Constitution. The disconnection of water services amounted to a breach of a pre-existing water supply. The applicant clearly fell within the ambit of section 4(3)(c) of the Water Services Act as she had shown that she was unable to pay for water services. Even though at the time of the litigation the Regulation which defined basic water supply had not been promulgated, the court should have refrained from dismissing the applicant's reliance on the constitutional right to water late in the litigation. This interpretation by the Courts was

[547] See paras 10-23.
[548] Para 41.
[549] See *Government Gazette*, Gazette No 22355, Notice R509 of 2001 (8 June 2001) published in terms of the Water Services Act 108 of 1997.
[550] Paras 43-44.
[551] Para 44.

characterised by unnecessary rigidity and formalism, which is not consonant with South Africa's transformative constitution.[552]

The court could also have sought inspiration from international law in accordance with section 39(1)(b) of the South African Constitution. In the case of *Joseph v City of Johannesburg* (hereinafter referred to as "*Joseph case*"), the Constitutional Court emphasised the duty of public service providers to comply with procedural fairness requirements under the Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as "PAJA") before taking a decision to disconnect basic services.[553] Significantly, the Court emphasised in the *Joseph case* that the local government is constitutionally obliged to meet the basic needs of all inhabitants of South Africa.[554]

4 5 1 3 *Mazibuko & Others v Government of South Africa & Others*

In the *Mazibuko* case, the applicants, residents of Phiri, a poor township in Soweto brought a case against the City of Johannesburg, Johannesburg Water[555] and the national minister responsible for water and forestry.[556] The first issue that the Court had to determine was whether the City of Johannesburg's policy with regard to the supply of free basic water of 6 kilolitres per household per month was in conflict with section 1 of the Water Services Act and the right of access to sufficient water in section 27 of the South African Constitution. Section 1 of the Water Services Act defines a "basic water supply" as the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water for households, including informal households, to support life and personal hygiene. This provision is relevant for the purposes of ascertaining the sufficiency of the right of access to sufficient water enshrined under section 27(1)(b) of the Constitution.

---

[552] The term "transformative constitutionalism" in reference to South Africa's 1996 Constitution was first used by Karl Klare. See K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *South African Journal of Human Rights* 146 146.

[553] See *Joseph v City of Johannesburg* 2010 4 SA 55 (CC). For a useful analysis of the case, see D Bilchitz "Citizenship and Community: Exploring the Right to Receive Basic Municipal Services in *Joseph*" 2010) 3 *Constitutional Court Review* 45-78.

[554] 216.

[555] Johannesburg Water is a private company wholly-owned by the City of Johannesburg mandated with the responsibility of providing water and sanitation to the residents of Johannesburg.

[556] The case was filed in the South Gauteng High Court in Johannesburg, in July 2006. The applicants identified two key issues, whether the City of Johannesburg's policy of supplying 6 kilolitres of water free to every household in the city was in compliance with section 27 of the Constitution and whether the installation of pre-paid meters was lawful. For the South Gauteng High Court judgment see *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as amicus curiae)* 2008 4 All SA 471 (W).

Additionally, Regulation 3 of the regulations providing for compulsory national standards and measures to conserve water[557] defines the minimum standard for basic water supply services to be "a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month."[558] The applicants argued that the City of Johannesburg should have provided more free basic water, in light of its constitutional obligations to act in a reasonable manner in ensuring that a poor community such as *Phiri* had access to sufficient water. The second issue the Constitutional Court was called upon to determine was whether the installation of pre-paid water meters in *Phiri* which charged consumers for use of water in excess of the free basic water allowance was lawful.

The applicants also challenged the lawfulness of prepaid meters installed in *Phiri* on several grounds. The applicants pointed out that the *Phiri* residents were previously provided with water services on the basis of a deemed consumption tariff. They argued that the implementation of *Operation Gcin'amanzi*, which led to the installation of prepaid meters, constituted a deprivation of their existing right of access to sufficient water. This resulted in a breach of the City of Johannesburg's obligation to respect the right of access to water.[559] The case also dealt with the State's duty to fulfill the right to water. The applicants argued that the Supreme Court of Appeal had erred in determining that the sufficient amount of water required by section 27 is 42 litres per person per day, rather than 50 litres per person per day. The applicants further argued for an order declaring that the City of Johannesburg was obliged to provide this amount of water free of charge to all the residents of *Phiri* who cannot afford to pay for their own water.[560]

In addition, the appellants challenged the installation of pre-paid metres on the basis that they breached the equality and non-discrimination guarantees in section 9(3) of the South African Constitution. They argued that the installation of prepaid meters in *Phiri Township* of Soweto discriminated unfairly between poor black South Africans and wealthy white South Africans. The residents of *Phiri* were only offered the option of a water supply delivered to their homes on condition that they accepted a pre-paid water meter. The *Phiri* residents were not offered the option of a credit

[557] See *Government Gazette*, Gazette No 22355, Notice R509 of 2001 (8 June 2001) published in terms of the Water Services Act 108 of 1997.
30 Regulation 3(b)
[558] Regulation 3(b)
[559] See *Mazibuko* Para 135.
[560] Para 31.

meter offered in the wealthy, formerly white suburbs. Significantly, those who obtain water through a credit meter have a grace period within which to pay for water already consumed. They are also entitled to procedural safeguards such as a fair hearing and an opportunity to make representations prior to any disconnection of water services.[561]

The High Court (South Gauteng) had found the installation of prepaid water meters unlawful and unfair. The High Court had ruled that the City of Johannesburg's Free Basic Water policy was unreasonable in terms of section 27(2) of the Constitution and therefore unlawful.[562] The High Court had also ruled that the City of Johannesburg should provide 50 litres of free basic water per person daily to the applicants and similarly placed residents of *Phiri*.[563] On appeal, the Supreme Court of Appeal held that 42 litres of water per person per day would be sufficient water within the meaning of section 27(1)(b) of the South African Constitution.[564] The Supreme Court of Appeal therefore directed the City of Johannesburg to reformulate its policy in light of this decision.[565] The Supreme Court of Appeal further held that the installation of prepaid water meters was unlawful.[566] It grounded its finding on the failure by the City of Johannesburg's by-laws to make provision for prepaid meters and that the cut-off in water supply that occurs when the free basic water limit has been exhausted constituted an unlawful discontinuation of water supply.[567]

On appeal, the Court overturned the Supreme Court of Appeal decision.[568] The Court held that the right of access to sufficient water does not require the State to provide upon demand to every person with sufficient water. The right, according to the Court, only requires the State to take reasonable legislative and other measures progressively to realise the achievement of the right within available resources. The Court rejected the applicants' argument that the court should adopt a quantified standard determining the content of the right not merely its minimum content.[569] The Court further stated that the positive obligations imposed upon government by socio-

[561] Paras 304–305.
[562] Paras 104-107.
[563] Paras 56-70 and 96-103.
[564] *City of Johannesburg and Others v Mazibuko and Others (Centre on Housing Rights and Evictions as amicus curiae)* 2009 (3) SA 592 (SCA), paras 38 and 24.
[565] Para 43.
[566] Para 58.
[567] Paras 55-57.
[568] For the Constitutional Court decision, see *Mazibuko and Others v City of Johannesburg and Others* 2010 4 SA 1 (CC) (hereinafter referred to as "*Mazibuko*.")
[569] Para 50.

economic rights will be enforced by courts where government fails to take steps to realise the rights. Courts will also intervene where measures adopted by the government are unreasonable or fail to give effect to the latter's duty under the obligation of progressive realisation to continually review its policies.[570]

The Court therefore found that the City's Free Basic Water policy fell within the bounds of reasonableness and therefore did not contravene either section 27 of the Constitution or national legislation regulating water services. The Court noted that the City of Johannesburg continually reconsidered and reviewed its policy and investigated ways and undertook research to ensure that the poorest inhabitants of the City gained access to water.[571] The Court therefore found the City of Johannesburg's free basic water policy was not unreasonable.[572] On the question of the constitutionality of the prepaid water meters, the Court held (contrary to the High Court and the Supreme Court of Appeal's findings) that national legislation and the city's own by-laws authorised the latter to introduce prepaid water meters.[573] According to the Court, the cessation in water supply caused by a prepaid meter stopping is better understood as a temporary suspension in supply, not a discontinuation in water supply. In the Court's view, the installation of prepaid meters was therefore not in violation of the constitutional provision.[574]

Furthermore, the Court ruled that even if the prepaid water meter system was discriminatory in its impact, it would not be unconstitutional "if it can be shown that the purpose for which the policy was introduced was not unfair for the purposes of s 9(3)."[575] The Court further pointed out that the purpose of the measure was to eradicate severe water losses in Soweto hence it was a laudable objective.[576] The Court explained that credit meter users were also not afforded a choice to have a pre-payment meter system with its reduced tariffs unless certain strict conditions were satisfied. The Court therefore justified restricting consumer choice in altering the water delivery system on the basis of the substantial cost of the installation of either system.[577] The Court thus concluded that the installation of the pre-payment

[570] Paras 66-72.
[571] Para 94.
[572] Para 97.
[573] Paras 157-158.
[574] Paras 106-111 and 157-158.
[575] Para 150.
[576] Paras 150 & 154.
[577] Para 155.

meter system did not constitute unfair discrimination in respect of the *Phiri* residents.[578]

Liebenberg has argued that the Court adopted a narrow frame of reference in ascertaining the deleterious impact of the pre-payment meter system on impoverished communities.[579] This is particularly the case with poor households who are only limited to the free basic provision of 6 kilolitres per household per month should they be unable to pay for additional water supplies. This has negative implications for the life, health and dignity of such communities. Additionally, the absence of procedural safeguards prior to the discontinuation of water supply services from a household should they fail to pay for additional water puts them at a further disadvantage.[580]

The Court should have done better by adopting a substantive and contextual conception of equality. The Court's failure to do so resulted in its inability to appreciate the impacts of a prepaid system in comparison to a credit metered water supply system taking into account the socio-economic background of the community in question.[581] This is because households from the former white suburbs experiencing financial challenges in paying for their water consumption are afforded statutory procedural safeguards of notice. They are also entitled to make representations and, if need be, enter into an arrangement with the water services supplier for a staggered payment of any arrears on their water bills. Such safeguards are not available to poor households such as those in *Phiri*. This has led Liebenberg to argue that:

> "The benefits afforded by the statutory procedural safeguards are not merely formal. In the context of a basic need and a fundamental constitutional right, they allow for an individualised consideration of the actual circumstances of the consumer. This is a critical safeguard against the impersonal disconnection of water services, particularly in circumstances that pose a threat to people's lives, health and human dignity. The values of human dignity and equality are implicated when an impoverished community is denied the opportunity afforded to affluent communities of making

[578] Paras 154 &157.
[579] Liebenberg *Socio-Economic Rights* 478.
[580] 478.
[581] 478.

> representations on their particular circumstances prior to the disconnection of their water supply."[582]

The *Mazibuko* case clearly raised a number of a State's obligations imposed by the right to water, principally the obligations to respect, protect, fulfill and promote. For instance, contrary to those with conventional credit meters, the poor residents of *Phiri* are not provided with procedural safeguards of notice and an opportunity to make representations in the event of difficulties in paying for water consumption beyond the free basic supply. Liebenberg has argued that:

> "In the context of a basic need and a fundamental constitutional right...(procedural safeguards) allow for an individualised consideration of the actual circumstances of the consumer. This is a critical safeguard against the impersonal disconnection of water services, particularly in circumstances that pose a threat to people's lives, health and human dignity."[583]

Liebenberg has pointed that the Court's dismissal of the challenge to the sufficiency of the free basic water supply shows the limitations of a reasonableness review disconnected from a "substantive analysis of the normative purposes and values underpinning the relevant socio-economic rights."[584] Such an approach, according to Liebenberg, resulted in the Court failing to give any significance to the right of access to sufficient water enshrined in the South African Constitution. This was despite the applicants having argued for the Court to assess the reasonableness of the measures adopted by the City of Johannesburg in respect of the *Phiri* community in light of the normative standards and values imposed by the right to water provided in the Constitution.[585]

What is particularly noteworthy is that the Court failed to emphasise the City's obligation to progressively improve the quality of access to water for the *Phiri* community. Rather, the Court interpreted progressive realisation to imply the obligation of the State to continuously review its policies and to be flexible and

---

[582] 479.
[583] 479.
[584] 467.
[585] Liebenberg argues that the relevant considerations which the City should have taken into account in exercising its discretion to provide more than the prescribed minimum amount of water include the basic water needs of the affected households, the impact on their life, health and dignity of restricting their free basic water supply to 25 litres per person per day and the available resources to the City. Liebenberg *Socio-Economic Rights* 467-468.

adaptable to changing circumstances.[586] Liebenberg points out that although such can be useful tools of accountability, they avoid the substantive dimension of progressive realisation.[587] It is pertinent to refer to General Comment No 3 in which the CESCR defined the concept of progressive realisation as placing a substantive, positive obligation on the State to move expeditiously towards achieving the full realisation of socio-economic rights.[588]

Although the Supreme Court of Appeal had, as noted above, upheld the argument that the installation of prepaid water meters had not been authorised by any law, the Court dismissed the various grounds on which the applicants challenged the legality of the prepaid water meters installed in the *Phiri* community. The Court interpreted the City of Johannesburg's by-laws to permit the installation of pre-paid meters.[589] Liebenberg has argued that the Court adopted a particularly restrictive and formalistic interpretation of the Water Services Act and the relevant by-laws.[590] Quinot has pointed out the absence of any detailed reference by the Court to the perilous personal circumstances of many of the residents of Phiri and the effect of the limitation of water introduced by *Operation Gcin'amanzi* on their lives.[591] This is despite the detailed submissions made in that regard by the appellants in their papers to the Court. Quinot further points out that in its summary of the case's background, the Court approached the facts from the perspective of the City of Johannesburg. For instance, the Court points out to "significant water losses in Soweto and the problem of non-payment," "ostensible success" and "customer satisfaction" of the project.[592]

Despite the legislative requirements for an opportunity to make representations prior to the termination of a person's water supply, the Court's finding that these procedural safeguards are not applicable to people with prepaid meters is open to criticism.[593] Such an interpretation implies that the fundamental guarantees of procedural fairness in the Water Services Act depends on the technical

[586] Liebenberg *Socio-Economic Rights* 470.
[587] 470.
[588] CESCR *General Comment 3* (1990) para 9.
[589] See *Mazibuko* paras 106-109.
[590] Liebenberg *Socio-Economic Rights* 473.
[591] G Quinot "Substantive Reasoning in Administrative-law Adjudication" (2010) 3 *Constitutional Court Review* 111 126.
[592] 126.
[593] These procedural safeguards would therefore only be applicable to persons who have credit meters installed.

mechanisms through which a person's water supply is measured.[594] Consequently, procedural fairness is a preserve of those with credit meters. Such an interpretative approach undermines the purposes of section 4(3) of the Water Services Act. Section 4(3) is clearly designed to provide fair and equitable procedures for the limitation or discontinuation of water services.[595] Furthermore, it also expressly provides for circumstances where there can be departures from the requirements of notice and provides for an opportunity to make representations.[596]

The safeguards provided in section 4(3) of the Water Services Act are intended to apply to any interference in people's access to water. Any exclusions from the procedural safeguards in section 4(3) need to be in express terms had this been the legislative intention.[597] The *Mazibuko* decision shows that formalism pervaded the Court's analysis of equality and procedural fairness rights raised by the applicants.[598] Ultimately, the Court ended up engaging in a superficial analysis of the impact of the City of Johannesburg's policies on the *Phiri* community.[599]

Quinot further points to what he refers to as the Court's "reframing" of the applicants' case.[600] The Court cast the applicants' argument in favour of a specific amount of free water as a minimum core argument.[601] The Court interpreted the appellants' arguments as advocating for a minimum core to the right to water under

[594] Liebenberg *Socio-Economic Rights* 474-475.
[595] 474.
[596] Section 4(3)(b)(i)-(iii).
[597] Liebenberg *Socio-Economic Rights* 474.
[598] 480.
[599] 480. In Britain, in *R v Director General of Water Services Ex parte Lancashire* CC the Queen's Bench Division was faced with the task of interpreting similar provisions in the Water Industry Act of 1991. Six local authorities applied for judicial review of the refusal of the Director-General of Water Services to require the relevant water undertaker, in terms of the Water Industry Act, to remove, and not install any further, pre-payment water devices known as "budget payment units" (BPUs) in domestic premises in each of the applicants' areas. It was argued on behalf of the respondent that the closure of the valve on a BPU when not recharged by the customer did not amount to a cutting off of supply within the meaning of the Water Industry Act. It was further argued that even if such closure amounted to a disconnection, the disconnection of water supply was not carried out by the undertaker and therefore there was no violation of the Act by the undertaker. The court was not persuaded by these arguments. The court held that the automatic operation of the closure of the valve disconnects the water supply to the premises within the meaning of the legislation. The court also dismissed the argument that the customer is the person who disconnects water supply, on the basis that it is the customer's choice to have a BPU and the customer who fails to recharge it. The court concluded that there was no difference between a water supply being cut off by the automatic operation of the undertaker's BPU and manual operation by the undertaker's workers. In both cases the supply is cut off by the undertaker as a result of the customer's failure to pay. It was therefore held that the use of BPUs contravened the Water Industry Act because they cut water supply without observing the notice requirements or procedural provisions protecting individuals who could not afford to pay or who disputed their bills. See *R v Director General of Water Services Ex parte Lancashire* CC (1999) Env LH 114.
[600] Quinot 2010 *Constitutional Court Review* 127.
[601] *Mazibuko* para 52.

section 27(1) of the Constitution. On the contrary, the appellants had argued for the recognition of a substantive standard of water provision against which the respondents' conduct should be assessed in light of the reasonableness approach developed by the Court in its earlier jurisprudence. Quinot argues that the latter argument is not the same as advocating for a minimum core approach.[602] Ultimately, the Court's interpretation of the applicants' argument as a minimum core one allowed it to rely on its earlier decision in such cases as *Treatment Action Campaign* and *Grootboom* to reject the minimum core argument.[603] The result is that the Court adopted a formalistic reasoning technique to avoid the substantive question in the case, which was the standard of water provision against which the respondents' conduct should be assessed in light of the constitutional provision guaranteeing the right of access to water.[604]

The Court's reasoning thus leads to a largely process-orientated view of the enforcement of the right of access to water and other socio-economic rights protected under section 27 of the Constitution. Williams has also argued that the Court's judgement in *Mazibuko* failed "to give the idea of accountability a searching and robust content."[605] Particularly noteworthy is the Court's failure to engage into a deeper inquiry and analysis of the evidence of how the City of Johannesburg arrived at its quantitative targets of the amount of free basic water. The Court acquiesced to the City of Johannesburg's free basic water policy "under a reasonableness standard in terse, conclusory language without providing probing analysis."[606] In doing so, the "Court gave presumptive validity to the City's data and calculation methods, thereby failing to hold the City accountable in any meaningful way."[607] Williams has further pointed out that another short-coming of the *Mazibuko* judgement was the Court's failure to provide the respective arms of government with minimal direction in setting standards and guidance to future litigants and the public as to the criteria and inquiries that will comprise reasonableness review in socio-economic rights cases.

What is particularly noteworthy is that the Court failed to emphasise the City of Johannesburg's obligation to progressively improve the quality of access to water for

[602] Quinot 2010 *Constitutional Court Review* 127.
[603] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC). See also *Mazibuko* paras 53-56.
[604] Quinot 2010 *Constitutional Court Review* 127.
[605] LA Williams "The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study" 2010 (3) *Constitutional Court Review* 141 186.
[606] 189.
[607] 189.

the *Phiri* community. Rather, it interpreted progressive realisation to imply the obligation of the State to continuously review its policies and to be flexible and adaptable to changing circumstances.[608] The following section discusses an illuminating decision of the Botswana Court of Appeal in *Mosetlhanyane and others v Attorney General of Botswana*.

4 5 2 *Mosetlhanyane and others v Attorney General of Botswana*

In the *Mosetlhanyane and others v Attorney General of Botswana*[609] case, the Botswana Court of Appeal relied on international law and the a civil and political right protected in the Constitution of Botswana to emphasise the State's duty to desist from interfering with a community's enjoyment of access to water services. This was particularly creative on the part of the court, given that Botswana's legal framework does not provide for a right to water. Botswana is also not a State party to the ICESCR. Botswana's 1966 Constitution[610] does not provide for socio-economic rights and only protects civil and political rights. Although Botswana has signed and ratified a significant number of international and regional instruments such as CEDAW, ICCPR and the African Charter, these have neither been incorporated into the Constitution nor municipal law of Botswana.

In 1985 *De Beers* mining company agreed that a borehole it had drilled for prospecting purposes, but no longer needed, could be used as a water source by the *Basarwa/San* people, residents of Central Kalahari Game Reserve (hereinafter referred to as "CKGR").[611] Between 1986 and 2002, the local authority had maintained the borehole and regularly supplied water in tankers to the *Basarwa* residents of the reserve and other parts of the CKGR.[612] The Government of Botswana later evicted and resettled the *Basarwa* outside of the CKGR as it felt that human settlements were incompatible with the conservation of wildlife in the game reserve.[613] In an attempt to dissuade the *Basarwa* from returning to the reserve, the State dismantled the pump engine and water tank installed for the purpose of using the borehole, which was the only source of water within a 40km radius.[614] In an

[608] Liebenberg *Socio-Economic Rights* 470.
[609] *Mosetlhanyane and others v Attorney General of Botswana* Civil Appeal No CACLB-074-10.
[610] Constitution of the Botswana, 1996.
[611] Para 5.
[612] Para 5.
[613] Para 6.
[614] Para 7.

earlier ruling handed down by the Botswana High Court in *Sesana and Others v Attorney General of Botswana* case in 2006, the court had found that this eviction was unconstitutional and ruled that the *Basarwa* should be permitted to return to the CKGR.[615]

The main issue before the Botswana Court of Appeal was whether the appellants had a right to use water for domestic purposes at their own expense in terms of section 6 of the Water Act Chapter 34:01 of 1968.[616] In this case, the Botswana Court of Appeal went further and found that because the *Basarwa* were lawful occupiers of the CKGR, they have a right to utilise existing boreholes and drill new ones to procure water for domestic uses. The court further ruled that lawful occupiers of land such as the appellants must be able to utilise underground water otherwise their occupation would be rendered meaningless.[617]

The applicants also deployed a typical civil and political right to buttress their claim, relying on the domestic constitutional provision proscribing the infliction of torture or inhuman or degrading punishment or other treatment.[618] After referring to section 7(1) of the Constitution of Botswana which guarantees the right not to be subject to inhumane or degrading treatment, the court held that the State's actions constituted a violation of the applicants' fundamental rights.[619] The court acknowledged the existence of "international consensus for the government to refrain from inflicting degrading treatment."[620] The court referred to the CESCR's General Comment 15 and the 2010 UN General Assembly resolution on the right to safe and clean drinking water[621] to affirm that water is a human right and an underlying determinant of the rights to health and life. Significantly, the court noted that States have particular obligations to prevent encroachment and pollution on indigenous people's lands, and to provide resources for indigenous groups to design, deliver and control their access to water.[622]

Despite the court's creativity in the decision, the ruling is disappointing in some respects. The court only emphasised the State's duty of non-interference

[615] *Sesana and Others v Attorney-General* (2006) AHRLR 183.
[616] Water Act Chapter 34:01 of 1968. See *Mosetlhanyane* para 18.
[617] See *Mosetlhanyane* para 16.
[618] Section 7(1) of the Constitution of Botswana (1966) provides that "[n]o person shall be subjected to torture or to inhumane treatment or degrading punishment or other treatment."
[619] *Mosetlhanyane* para 22.
[620] Para 22.
[621] General Assembly Resolution 64/292 on the Human Right to Water and Sanitation (2010) A/64/L 63/Rev 1.
[622] Para 22.

despite relying on some provisions of the General Comment 15 and the 2010 General Assembly resolution on the right to water. The court should have seized the moment by drawing inspiration from the African Commission decisions in *Endorois* and *Sudan Human Rights Commission/COHRE v Sudan* discussed above. Given that the *Basarwa* constitute a vulnerable indigenous group and Botswana is a State party to the African Charter, the court should have drawn inspiration from the above cases and emphasised the State's duty, especially in respect of an impoverished and vulnerable indigenous group, to fulfill the right to water by providing resources to the group in order for it to design, deliver and control its access to water. The following section discusses some case law from Argentina on the right to water.

4 5 3 Argentinean case law

4 5 3 1 *Quevedo Miguel Angel y Otros c/ Aguas Cordobesas S.A.*

The *Quevedo Miguel Angel y Otros c/ Aguas Cordobesas S.A.*[623] case involved the disconnection of water services to a poor community. This gave the court an opportunity to adjudicate the protective duty of the State imposed by socio-economic rights. The water supply to a group of low income and indigent families living in the City of Cordoba had been disconnected by a private water company due to non-payment.[624] The applicants sued the water service company, arguing that the disconnection was illegal in that the company had failed to comply with its regulatory obligation to provide 50 litres of water daily per family which was to be provided regardless of payment.[625] The applicants further petitioned the court to obligate the company to provide them with at least 200 litres of water per family per day, arguing that even that minimum supply obligation was too low.[626] It is significant to note that the court appeared to endorse the minimum core approach to the provision of water. The court held that "the provision of a minimum quantity of potable water...because of its public utility character, must be guaranteed to all individuals."[627] For that reason the court found 50 litres of water per family per day not sufficient to satisfy

[623] See *Ciudad de Córdoba, Juez Sustituta de Primera Instancia y 51 Nominación en lo Civil y Comercial: Quevedo Miguel Angel y Otros c/ Aguas Cordobesas S.A., Acción de Amparo*, (8 April 2002). Translated and reported in Centre on Housing Rights and Evictions (COHRE) *Legal Resources for the Right to Water and Sanitation International and National Standards* (2008) 312.
[624] 312.
[625] 312.
[626] 312.
[627] 313.

that minimum as "it cannot guarantee basic conditions of hygiene and health."[628] The court held that the company had the right to reduce (but not to disconnect) the applicants' water supply for non-payment. The court held that the right to have access to the provision of drinking water concerns the health and physical integrity of the affected individuals.

The lack of access to water has many deleterious implications for the health of the appellants, especially those from the low income bracket. The court stated that by virtue of its character as a public utility, the provision of a minimum quantity of drinking water must be guaranteed to everyone.[629] The court relied on a provincial law that provided for everyone's right to receive adequate public services to meet their basic needs to rule that the State is responsible for providing drinking water, as it is an essential service.[630] The court further stated that:

> "Were the State to fail to provide adequate public utilities at the required quality and quantity, at low cost and with regulated tariffs, taking into account the situation of the less well-off, the State would not only be violating the very principles that justify the reasons of its existence (ensuring the general well-being and promoting the common good), but also Constitutional norms that regulate its functions – such as Article 42 of the National Constitution that expressly obliges the State to ensure the existence of adequate and efficient public utilities services and to effectively regulate and control them."[631]

The court therefore ordered the private company to provide a minimum of 200 litres of potable water per family.[632] The court proceeded to stipulate that an arrangement be reached between the company and State authorities for compensation over the costs incurred by such action. The court was therefore asserting the State's duty to protect against violation of the right to water by a third party through deprivation of water services supply. The court also reiterated the State's duty to provide access to a minimum quantity of water services by ruling that the State was going to bear the financial costs of the provision of 200 litres of potable water daily per family.[633]

---

[628] 313.
[629] 313.
[630] 313.
[631] 313.
[632] 313.
[633] 313.

Most of the cases dealing with disconnections of water services or installation of water meters by municipalities such as the *Residents of Bon Vista* and *Mazibuko* focus on the State's duty to respect the right to water in respect of an existing water supply. The above case however dealt with disconnection of a water supply carried out by a private non-State actor. Such a scenario does not relate to the State's obligation to respect as it is not the State acting to deprive people of their access to water supply services. Rather, the State's duty to protect the right to water in the context of water services privatisation by establishing the necessary regulatory framework becomes relevant. This is consistent with the approach stated above that the State has an obligation to prevent third parties from threatening access to equal, affordable, sufficient, safe and acceptable water especially in privatisation contexts.[634]

4 5 3 2 *Menores Comunidad Paynemil*

In the *Menores Comunidad Paynemil* case,[635] the Neuquen Province's Official Defender of Minors filed a complaint alleging the pollution of water with heavy metals by an oil company. This resulted in the contamination of water sources with lead and mercury on which an indigenous *Mapuche* community of Paynemil in Neuquen depended for its water supply. Studies had revealed high levels of toxic metals in people's blood and urine. An "acción de amparo" (an expedited procedure) was launched against the government on the grounds that the latter had violated its obligation to protect the community's right to health by failing to regulate the private oil company.[636] The applicant petitioned that the State be ordered to provide sufficient drinking water to ensure the survival of the affected community, to conduct diagnosis and treatment of affected minors, and to adopt adequate measures to prevent future soil and water pollution.[637]

The Division II of Neuquen's Civil Court of Appeals (hereinafter the "Court") held that the State had not taken any reasonable measures to address the pollution problem, even though it was timeously informed about this deleterious situation

---

[634] See section 4 2 2 above.
[635] *Neuquen, Sala II, Cámara de Apelaciones en lo Civil: Menores Comunidad Paynemil, Acción de Amparo*
(Expte. No. 311-CA-1997, 19 May 1997). Translated and reported in Centre on Housing Rights and Evictions (COHRE) *Legal Resources for the Right to Water and Sanitation International and National Standards* (2008) 314.
[636] 314.
[637] 314.

threatening the health of the Paynemil community.[638] The court ordered the State to supply the Paynemil community with 250 litres of drinking water per family daily. The court further ordered the State to ensure the provision of drinking water by appropriate means within 45 days of the granting of the order.[639] The court held that, due to the serious consequences of water pollution, any delay in providing resources and in adopting steps necessary to reverse the prevailing situation constituted an illegal omission violating the Paynemil community's constitutional rights to health and to a safe environment.[640]

This case illustrates the close relation and interlinked nature of the different obligations imposed on the State by the right to water. The court made a finding that the government had violated its obligation to protect the *Mapuche* community from pollution of its water source by the non-State actor. In doing so, it emphasised the State's protective mandate towards public goods such as water, notwithstanding the management of this resource by a private actor. This is consistent with the international law position where States are obliged to take steps to prevent third parties from violating the right to water of individuals and communities in their jurisdictions. The court proceeded to rule that the State has an obligation to fulfill the right to water, at least in the form of the interim relief it granted. In the long-run, however, a sustainable solution would have to be found to foreclose the pollution of the indigenous community's drinking water sources by the non-State actor, again buttressing the State's duty to protect.

4 5 3 3 *Marchisio José Bautista y Otros*

In the *Marchisio José Bautista y Otros*,[641] the applicants, residents of a poor neighbourhood in the city of Córdoba, alleged an unconstitutional lack of access to the public water system and that existing water resources were being contaminated by untreated sewage.[642] The claimants had no connection to the public water distribution network, hence relied on domestic groundwater wells for their water

[638] 314.
[639] 315.
[640] 315.
[641] *Ciudad de Córdoba, Primera Instancia y 8 Nominación en lo Civil y Comercial: Marchisio José Bautista y Otros, Acción de Amparo* (Expte. No. 500003/36, 19 October 2004). For a discussion of the case and other case law from Argentina on the right to water, see I Winkler "Judicial Enforcement of the Right to Water" (2008) 1 *Law, Social Justice & Global Development Journal* 1 9-10.
[642] Para v.

supply. A water and sewage treatment plant was located upstream on the river close to these neighbourhoods. Due to the insufficient capacity of the treatment plant, untreated sewage from the plant was spilt into the river resulting in the claimants' water wells being polluted with faecal matter and other contaminants.[643]

Even though the Argentinean legal framework does not expressly recognise the right to water, the court held that this right is implied in the right to health hence the State had violated the right to water. The significance of the decision lies in the district court's endorsement of the interdependence of human rights. The court not only focused on the right to health only but also found a violation of the right to water under article 66.2 of the provincial constitution of Córdoba which protects the right to health. This allowed the court to order authorities to provide the applicants with 200 litres of safe drinking water per household per day until full access to the public water services could be ensured.[644] The court once again supported its minimum core approach as reflected in the *Marchisio José Bautista* above by ordering the authorities to provide 200 litres of water per family per day. McGraw has noted that the standard set in the *Marchisio José Bautista* case has been replicated in other cases as recently as 2007. The Special Administrative Chambers of Buenos Aires has confirmed that the State has an obligation to provide vulnerable populations with adequate access to water even if this will entail costly measures.[645]

The court referred to the various international human rights instruments incorporated in the Argentinean Constitution, particularly article 25 of the UDHR and articles 11 and 12 of the ICESCR. It also relied on General Comment 15 thus reiterating that the right to access safe water is indispensable for the right to health.[646] Furthermore, the court pointed out that the right to health encompasses measures to prevent damage to health such as providing water and this obliges the State to take positive measures.[647] The court therefore ordered the State to immediately take urgent measures to minimise the environmental impact of the plant until a permanent solution is found. The court further ordered the State to provide

[643] *Marchisio José Bautista* para v.
[644] Paras vi-ix.
[645] GS McGraw *Defining and Defending the Human Right to Water and its Minimum Core: Legal and Construction of the Role of National Jurisprudence* (2010) 69-70 <http://ssrn.com/abstract=1721029> (accessed 21.11.2011).
[646] Para VIII.
[647] Para VIII.

200 litres of safe drinking water per household per day until full access to the public water services is ensured.[648]

The *Marchisio José Bautista y Otros* case is very important as the court order included a positive obligation for the State to provide safe drinking water in the long-term by constructing a sewage treatment plant that has sufficient capacity. The urgency of the situation was such that the court ordered the State to avail the complainants with short-term relief in the form of 200 litres per household per day. The court's approach is in line with the international law injunction of ensuring "access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent disease."[649]

The above jurisprudence from Argentina clearly demonstrate that the full typology of human rights obligations engendered by the right to water can and have been adjudicated by courts, though not in a direct and explicit manner. The courts have dealt with a plethora of issues, ranging from disconnection of water services by private companies such as in the *Quevedo Miguel Angel y Otros Aguas Cordobesas S.A* case above referring to water privatisation to water pollution and the lack of access to water supply thereby emphasising the State's duty to protect. Notably, with regard to the obligation to fulfil, the Argentinean courts, like their South African counterparts, have distinguished between short-term relief and sustainable long-term solution meeting of minimum core obligations as well as the obligation to achieve progressively the full realisation of the right to water.

The Indian legal framework does not explicitly recognise access to safe water as a human right. Additionally, the Indian Constitution provides for economic, social, and cultural rights only in the form of non-justiciable Directive Principles of State Policy. Nevertheless, these Directive Principles of State Policy are important in the formulation of public policy, governance, and the interpretation of constitutional rights despite their character as non-justiciable.[650] The following section discusses some of the jurisprudence from the Indian courts relating to the right to water.

---

[648] Para VIII.
[649] CESCR *General Comment 15* (2002) para 37 (a).
[650] Article 37 of the Constitution of India (1949). See for example article 39 (b) which provides that "the State shall, in particular, direct its policy towards securing . . . that the ownership and control of the material resources of the community are so distributed as best to subserve the common good." Article 38(1) provides for the "State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life" while article 47 provides for the "State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public

4 5 4 India

The right to water has evolved in India, not through legislative action but through judicial interpretation. Indian courts, in particular the Indian Supreme Court have primarily derived the right to water from the right to life guaranteed under article 21 of the Indian Constitution. This right has been interpreted to include all facets of life to encompass the right to a clean environment to sustain life.[651] While upholding the Indian government's decision to construct over 3,000 dams on the river Narmada, the Indian Supreme Court described water as a basic need for the survival of human beings and part of the right of life.[652] In the case of *Subhash Kumar,*[653] the court stated that the right to life under article 21 "includes the right of enjoyment of pollution free water and air for full enjoyment of life."[654] This position has since been expressed in many cases. This section only presents a limited selection to illustrate the extent to which Indian courts have adjudicated on the right to water.

4 5 4 1 *FK Hussain v Union of India*

In the case of *FK Hussain v Union of India* [655] the High Court of Kerala had to adjudicate on a case involving the situation on certain coral islands where fresh water resources are scarce. The local authority adopted a programme to augment drinking water supply by extracting more groundwater using modern ground water technology to cater for the demands of the increasing population. The petitioners argued that the increased extraction of fresh water from ground water reserves would upset the fresh water equilibrium and lead to salinity of groundwater.[656] The court held that the local authority's action would amount to an infringement of article 21 of the Indian Constitution as the right to life "is much more than the right to animal existence...[t]he right to sweet water, and the right to free air, are attributes of the right to life."[657]

---

health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health." For further discussion of these provisions of the Indian Constitution, see also V Narain "Water as a Fundamental Right: A Perspective from India" (2009) 34 *Vermont Law Review* 917 920.

[651] *Francis Coralie Mullin v Adm'r, Union Territory of Delhi* (1981) 2 SCR 516 paras 4–6.

[652] *Narmada Bachao Andolan v Union of India* AIR 2000 SC 375 para 274.

[653] *Subhash Kumar v State of Bihar and Others* (1991) AIR 420.

[654] 424.

[655] *FK Hussain v Union of India* AIR 1990 Ker 321.

[656] Para 6.

[657] Para 7.

The court therefore directed the local authority to ensure that its action would not result in salt water intrusion in order to protect the existing water supply and thereby to respect the right to water of the inhabitants of the islands.[658] The case is important in so far as it recognised the right to water and affirmed a State's duty to respect existing access to water.

4 5 4 2 *Perumatty Grama Panchayat v State of Kerala*

In *Perumatty Grama Panchayat v State of Kerala*[659] the High Court of Kerala discussed at length the State's duty to protect access to water. The case concerned a petition for the cancellation of a licence of a non-alcoholic beverages entity due to its excessive exploitation of groundwater resources. It was alleged that the excessive extraction of underground water had resulted in the drying up of water sources, leading to acute drinking water scarcity in the region.[660] The village council had subsequently refused the company permission to extract groundwater. The company argued that there was no law governing the exploitation and use of groundwater resources, and for that reason everybody had the right to extract any groundwater available on their land.[661]

The court pointed out that the arguments advanced by the company were incompatible with the emerging environmental jurisprudence developed around article 21 of the Indian constitution. The court made reference to Principle 2 of the Stockholm Declaration (discussed in chapter 2),[662] and stated that the natural resources of the earth must be safeguarded for the benefit of present and future generations.[663] Additionally, the court relied heavily on the public trust doctrine based on English common law, pointing out that "[t]he State is the trustee of all natural resources which are by nature meant for public use and enjoyment."[664] On that basis, the court ruled that the State has an obligation to protect natural resources.[665] The court ruled that the underground water belongs to the public and must be protected by the State against excessive exploitation. According to the court, the State's neglect of its duty of protection would constitute an infringement of the right to life

[658] Para 7.
[659] *Perumatty Grama Panchayat v State of Kerala* 2004 (1) KLT 731.
[660] Para 3.
[661] Para 6.
[662] See section 2 5 6 2, chapter 2.
[663] *Perumatty Grama Panchayat v State of Kerala* para 13.
[664] Para 34.
[665] Para 34.

protected under article 21 of the Indian Constitution as the right to clean water is a constituent component of the right to life.[666]

Although the court acknowledged a land owners' customary right to extract reasonable amounts of ground water under their land for domestic uses and to meet agricultural requirements, the court ruled that in the present case the amount of water that was withdrawn exceeded this quantity.[667] The court concluded that the excessive extraction of groundwater by the company was illegal and the State had a duty to prevent this, thereby emphasising the State's protective mandate as part of its obligation to protect access to water.[668] The CESCR has emphasised this aspect of the State's protective duty, enjoining the latter to adopt the necessary and effective legislative and other measures to restrain third parties from polluting and inequitably extracting from water resources.[669]

4 5 4 3 *Vellore Citizens Welfare Forum v Union of India*

In the landmark case of *Vellore Citizens Welfare Forum v Union of India,*[670] the court explicitly linked environmental concerns to the right to water. The petitioners were concerned about water pollution caused by more than 900 tanneries that were discharging untreated effluent in agricultural fields, waterways and open land. The untreated effluent from the tanneries ended up in the river *Palar* which was the main source of water supply for the residents of the area. Although the court acknowledged the importance of the leather industry to the Indian economy, it emphasised that this development must be sustainable as any developmental project must not destroy the ecology and constitute a hazard for human health.[671]

The court ruled that the Indian Constitution protected the right to clean water, citing the right to a clean environment as the source of the right.[672] The court thus ordered the government to implement the precautionary and polluter-pays principles and to ensure compensation for the victims of the water pollution.[673] In addition, the tanneries were ordered to set up pollution control devices, failing which the court

[666] Para 34.
[667] Para 34.
[668] Para 34.
[669] See CESCR *General Comment 15* (2002) para 23.
[670] *Vellore Citizens' Welfare Forum v Union of India* (1996) 5 SCC 647.
[671] Paras 11-14.
[672] Para 16.
[673] Para 16.

would order them to be closed.[674] This case is particularly important as it clearly illustrates the State's obligation to prevent third parties, in this case tanneries, from infringing on the right to water of others and to protect people from the pollution of their drinking water. The court thus enforced the State's obligation to prevent third parties from interfering with the enjoyment of the right to water by polluting water resources.[675]

4 5 4 4 *S K Garg v State of Uttar Pradesh and Others*

In the case of *S K Garg v State of Uttar Pradesh and Others,*[676] the petitioner approached the Allahabad High Court to compel the State of Uttar Pradesh to ensure regular water supply in the city of Allahabad whose water supply system was in a state of disrepair. This resulted in many neighbourhoods receiving very limited quantities or no water at all.[677] The court held that "the right to get water is part of the right to life guaranteed by article 21 of the Constitution."[678]

As part of its order, the court appointed a 11-member committee[679] that was directed to explore the problem of lack of access to water supply and to find a sustainable solution and submit a report to the court.[680] The court further ordered the committee to consider immediate remedial steps as well as long term solutions to address the situation. Although the court made several suggestions, it admitted that it lacked the technical expertise to make a decision on the best way to address the situation.[681] The court also issued a number of immediate orders against the State authorities. These included an order to repair the existing tube wells and hand pumps that had broken down within a week of the order as well as to regularly test water to ensure its drinking water quality.[682]

The court had to adjudicate the positive obligation to fulfill the right to water due to the lack of access to water supply. Significantly, the court acknowledged its lack of expertise to decide on how the government had to solve the problem and

---

[674] Para 16.
[675] See CESCR *General Comment 15* (2002) para 23.
[676] *S K Garg v State of Uttar Pradesh and Others* (1999) AIR All 41.
[677] Para 2.
[678] Para 7.
[679] The court-appointed committee was composed of the petitioner and 10 other members including the deputy magistrate of Allahabad, the chief medical officer of Allahabad, the chief engineer of Allahabad and other prominent personalities.
[680] Para 9.
[681] Para 10.
[682] Para 11.

realise the right to water. It therefore turned to the innovative solution of setting up a committee that was directed to investigate and resolve the issue. The State was in violation of its obligation to fulfill the right to water by neglecting to take all necessary steps to ensure the realisation of the right to water by residents of the city of Allahabad.[683] The court in this case affirmed the State's obligation to fulfill (provide) the right where individuals are unable, for reasons beyond their control, to realise that right themselves by the means at their disposal.[684]

4 6 Conclusion

This chapter discussed one of the key developments in international human rights theory and practice from the early 1980s, the development of typologies to elaborate the nature of obligations imposed by human rights instruments on States. It was demonstrated that all human rights, including the right to water, impose a spectrum of duties and that the duty applicable in a particular situation depends on a contextual evaluation of the case. Invariably, distinguishing between the various rights is not very helpful as an analytic model. The use of typologies as an analytical tool has contributed immensely to the further clarification of the normative content and the obligations that the right to water imposes on States. This chapter showed that using the typologies of State obligations as an analytical tool has helped to dispel the notion that there are any marked differences between human rights. Rather, the distinction should be between different levels of duties applicable in a particular case. This analytic model provides a better understanding of the scope and content of the right to water and helps to safeguard the right, whether water is provided by the State or a private operator.

The framework reinforces the point that privatisation of water services does not relieve the State of its duty to prevent violations of the right to water by third parties. A privatisation scheme should not lead to a situation where various components of the right to water are impinged upon. The State must put in place mechanisms to prevent and address violations by third parties. For a State to effectively discharge its protective mandate particularly where water services have

[683] See CESCR *General Comment 15* (2002) para 44 (c).
[684] Para 25.

been privatised, it is important for it to put in place a regulatory and monitoring mechanism to monitor the performance of water services providers.

Additionally, even in case of privatisation of water services, the State should put in place mechanisms to ameliorate the condition of less privileged and disadvantaged members of society. Denial of a basic water supply as a result of privatisation of water services not only poses a serious health risk, but also deprives the victims of their inherent dignity. The State should adopt intervention measures such as the use of a range of low-cost technologies and appropriate pricing policies such as free or low-cost water and income supplements, subsidies, and other related measures in favour of disadvantaged groups.

The above international regional and domestic case law reinforces the point that privatisation of water services does not relieve the State of its legal responsibility under international human rights law. A human rights approach to water privatisation mandates that privatisation of water services should have as its key objective the realisation of the right to water, especially by those currently unserved or underserved.

The next chapter discusses and analyses the question as to whether international human rights law, and in particular the human right to water, is directly binding on non-State actors involved in the provision of water services. This will help in the formulation of an accountability model explored in chapter 6.

Chapter 5

The right to water: The obligations of non-State actors

5 1 Introduction

International human rights law imposes obligations on States to respect, protect, promote and fulfill the human rights of those within their jurisdiction.[1] Not least among these are obligations to adopt policies and measures geared towards the progressive realisation of socio-economic rights such as the right to water.[2] Human rights treaties are State-focused in their nature and envisage ratification only by States. This is not surprising given that the former were adopted at a time when the State's leading role in the provision of certain goods and services fundamental to the functioning of society such as access to water, education and health services was unrivalled.[3] Globalisation,[4] liberalisation and privatisation[5] as highlighted above[6] have resulted in the loosening of the State's stranglehold in the provision and management of goods and services such as water, health and education. This has resulted in the concomitant prevalence of non-State actors involvement in the provision of goods and services.[7]

Despite the involvement of non-State actors in the provision of goods and services, the importance of water and other socio-economic rights to the wellbeing and dignity of individuals and groups remains unchanged. McBeth has argued that a

---

[1] See chapter 4 above, sections 4 2 1 - 4 2 4.

[2] A McBeth "Privatising Human Rights: What happens to the State's Human Rights Duties when Services are Privatised?" 2004 (5) *Melbourne Journal of International Law* 133 133.

[3] 133.

[4] According to Bertucci & Alberti:

> "[G]lobalisation is a complex phenomenon, which encompasses a great variety of tendencies and trends in the economic, social and cultural spheres. It has a multidimensional character and thus does not lend itself to a unique definition. For purposes of simplicity, it may be described as [the] increasing and intensified flows between countries of goods, services, capital, ideas, information and people, which produce cross-border integration of a number of economic, social and cultural activities." See G Bertucci & A Alberti "Globalisation and the Role of the State: Challenges and Perspectives" in DA Rondinelli & G Shabbir (eds) *Reinventing Government for the Twenty-First Century, State Capacity in a Globalising Society* (2003) 17 17.

[5] See chapter 3 section 3 2 3 above for definitions of liberalisation and privatisation.

[6] See chapter 3 above.

[7] Isa notes that:

> "With respect to the reduction of the role of the State, it is clear that liberalisation, privatisation and deregulation spawned by neoliberal globalisation are aimed at reducing the role of the State in economic and social systems... As a result, sectors previously covered by the public sector are left in the hands of the market." Isa further argues that such a process has "steadily weakened human rights protection in a number of countries, primarily affecting economic, social and cultural rights." FG Isa "Globalisation, Privatisation and Human Rights" in K De Feyter & FG Isa (eds) *Privatisation and Human Rights in the Age of Globalisation* (2005) 9 13.

change in an entity operating a prison, for example, does not alter the prisoners' right to be treated with dignity.[8] Similarly, the involvement of non-State actors in the provision of socio-economic goods such as water, health and education should not down-grade the significance of such goods to human welfare.

The relationship between human rights and non-State actors has become a highly topical area in current international and comparative law.[9] In recent decades, especially the 1990s, global markets have expanded significantly. This can be attributed to free trade agreements, bilateral investment treaties, and domestic liberalisation and privatisation.[10] The rights of transnational corporations have become more securely strengthened in national laws as part of market liberalisation. Such rights are increasingly being defended through compulsory arbitration before international arbitral tribunals through free trade and bilateral investment agreements.[11]

One of the fundamental issues engendered by privatisation as discussed above[12] is the prevalence of non-State actor involvement in the provision of basic goods such as water. The increase in privatisation entails that access to such basic services is increasingly dependent on the actions and policies of private service providers.[13] The traditional approach maintains that the protection of human rights

[8] See McBeth 2004 *Melbourne Journal of International Law* 134.

[9] DM Chirwa "In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights" (2008) 8 *African Human Rights Law Journal* 294 294. See further discussions in DM Chirwa "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights" (2004) 5 *Melbourne Journal of International Law* 1-36; K De Feyter & FG Isa (eds) *Privatisation and Human Rights in the Age of Globalisation* (2005); P Alston (ed) *Non-State Actors and Human Rights* (2005); A Clapham *Human Rights Obligations of Non-State Actors* (2006); SR Ratner "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 *Yale Law Journal* 443-545; M McFarland Sanchez-Moreno & T Higgins "No Recourse: Transnational Corporations and the Protection of ECOSOC Rights in Bolivia" (2004) 27 *Fordham International Law Journal* 1663-1805; C Jochnick "Confronting the Impunity of non-State Actors: New Fields for the Promotion of Human Rights" (1999) 21 *Human Rights Quarterly* 56-79.

[10] See Wels and Elias noting that these processes make it difficult to regard States as controlling their own separate economies as "States find that their role has become increasingly complex in a more highly interdependent world and take on the role of attempting to attract international capital rather than regulating it." See C Wels & J Elias "Catching the Conscience of the King: Corporate Players on the International State" in P Alston *Non-State Actors and Human Rights* (2005) 141 147.

[11] See United Nations Human Rights Council *Business and Human Rights-Mapping International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises* (2007) A/HRC/4/035 para 2.

[12] See chapter 3 above.

[13] See P Bond, D McDonald & G Ruiters "Water Privatisation in Southern Africa: The State of the Debate" (2003) 4 *Economic and Social Rights Review* 1 10.

remains exclusively the responsibility of States regardless of private involvement in the human rights sensitive goods and services.[14]

The State is obliged to regulate private relationships to ensure that individuals are not arbitrarily deprived of the enjoyment of their right to water by other private individuals and groups.[15] Recent experiences have demonstrated that private actors, like State actors, can and often do infringe on human rights of groups and individuals.[16] Feminist and children's rights scholars have also highlighted the limitations of the State-centric approach to human rights, arguing that women's and children's rights are particularly susceptible to infringement by non-State actors in private relations.[17] This has reinforced arguments against the view that human rights bind the State only with private actors exempt from such binding human rights obligations. This leads to the question as to whether a human right to water under international human rights law imposes any direct obligations on non-State actors involved in the provision of water services. This question is relevant because the involvement of non-State actors such as Multinational Corporations (hereinafter referred to as "MNCs") in the water sector has brought to the fore the issue of lack of accountability.[18]

The privatisation of human rights-sensitive services such as water brings with it a fundamental shift in the method for delivering positive human rights outcomes given the involvement of non-State actors.[19] Such actors are not directly addressed by human rights treaties despite their increasing involvement in the management and

[14] Chirwa 2004 *Melbourne Journal of International Law* 1 3.
[15] Craven *The International Covenant* 112.
[16] See Chirwa (2004) *Melbourne Journal of International Law* 3.
[17] See for instance C Romany "State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in Human Rights Law" in R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 85 95. See also Chirwa 2004 *Melbourne Journal of International Law* 2.
[18] See Chapter 3 above on the involvement of non-State actors in the provision of water services.
[19] The activities of MNCs often have a positive effect on economic, social and cultural rights. They provide much needed employment thus facilitating the right to work itself instrumental in the realisation of related socio-economic goods. Their innovation and the associated skills' transfer can lead to the creation of new products, such as new medicines which facilitate the enjoyment of socio-economic rights such as the rights to health or an adequate standard of living. However, corporate ownership or control of goods for human welfare such as water or patents in life-saving drugs may drive the price of such goods out of reach of poor people if not properly regulated. In a recent decision South Africa's Supreme Court of Appeal has ruled that public interest considerations must be taken into account when balancing the interests of the patentee and the infringer in determining whether or not to grant an interim interdict. The Supreme Court of Appeal however held that on the facts of the particular case, the public interest concerns did not weigh in favour of allowing infringer to sell its generic cancer drug in violation of the patentee's patent. See *Cipla Medpro v Aventis Pharma (139/12) Aventis Pharma SA* v *Cipla Life Sciences and Treatment Action Campaign* as *amicus curiae* (138/12) 2012 ZASCA 108 paras 46, 49 & 61.

distribution of social goods. Chapter 3 above discussed the prominence of non-State actors in the provision of water services as a result of the privatisation movement. The fundamental question that arises is whether this transfer of functional responsibility gives rise to a corresponding human rights duty on such non-State actors? This chapter is divided into three parts. The first part questions the efficacy of the State-centric focus of human rights approach, given the emergence of powerful non-State actors capable of abusing human rights in cases where the State is unable or unwilling to protect against such abuses. It proceeds to discuss the necessity as well as limitations of imposing direct obligations on non-State actors under international law. The second part discusses and analyses the emergence of voluntary soft law initiatives to impose human rights responsibilities on non-State actors. It discusses some of these initiatives and their potential for holding corporations responsible for the right to water in privatised contexts. The third part considers some concrete initiatives such as corporate codes of conduct, domestic legislation and other multi-stakeholder initiatives and their practical application for holding private corporations involved in the provision of water services accountable.

5 1 1 Imposing human rights duties on non-State actors

It is not rare in the literature to find the concept of non-State actor left undefined due to the elasticity of the concept.[20] Some authors such as Andrew Clapham and Philip Alston have attempted to define the term non-State actor.[21] Clapham starts from the premise that the concept of a non-State actor is generally understood to refer to any entity that is not a State such as armed groups, civil society and corporations.[22] Clapham notes that the open-ended nature of the term defies a restrictive definition and as such gives rise to misunderstandings and tensions. This is because

[20] P Alston "Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in P Alston (ed) *Non-State Actors and Human Rights* 3 14.
[21] A Clapham "Non State Actors" in V Chetail (ed) *Post-Conflict Peace-building: A Lexicon* (2009) 200-212.
[22] Clapham "Non-State Actors" in *Post-Conflict* 200. Senjonjo, for instance, pointed out that the term non-State actor is virtually open-ended. He thus defined the term to encompass all actors other than States. This includes Transnational Corporations (TNCs), professional bodies and other non-governmental organisations. It also extends to United Nations (UN) agencies, other international organisations, and specialist bodies within the UN system such as the World Health Organisation, the UN Children's Emergency Fund, the International Labour Organisation, the UN Development Programme and other intergovernmental organisations such as the World Trade Organisation (WTO), the International Monetary Fund (IMF) and the World Bank and regional development banks. See M Senyonjo "Non State Actors and Socio-Economic Rights" in MA Baderin & R McCorquodale (eds) *Economic, Social and Cultural Rights in Action* (2006) 109 111-112.

"corporations find themselves branded in the same category as rebel groups and the UN finds itself branded with paramilitaries."[23] Clearly such an expansive understanding of non-State actors is evidence of the extent to which the meaning attributed to the term has become heavily context-dependent.[24] This definitional problem is further noted by Philip Alston who concedes that "membership of this group is difficult to define and virtually open-ended."[25] Ratner has pointed out that in a legal system based and centered on States as the primary subjects, it is logical to describe the other actors as non-State actors.[26]

What is particularly noteworthy is that the term "non-State actor" has been used to refer to a wide range of actors. These include entities such as MNCs, intergovernmental organisations such as the African Union (hereinafter referred to as the "AU"), the World Trade Organisation (hereinafter referred to as the "WTO"), the International Monetary Fund (hereinafter referred to as the "IMF") and the World Bank.[27] It has also been used to refer to supranational organisations such as the European Union (hereinafter referred to as the "EU"), liberation movements, insurgent groups, and voluntary associations.[28]

The European Commission identifies three criteria for an organisation to qualify as a non-State actor. The first criterion is that the organisation must have been created voluntarily by citizens. Secondly, although the organisation can be a for-profit or not-for profit one, it must be independent of the State. The third criterion is that the organisation must have as its main aim defending an issue or defending an interest. According to the EU, such non-State actors include non-governmental organisations (hereinafter referred to as "NGOs"), trade unions, employers'

[23] Alston also alludes to the difficulties of defining a non-State actors, pointing out that:
> "[T]he resulting grab-bag of miscellaneous players ranges from transnational corporations and small time business and contactors, through religious and labour groups, organised epistemic communities, civil society…international organisations to terrorist bands and armed resistance groups." See Alston "Not-a-Cat Syndrome" in *Non State Actors* 5.

[24] 17.
[25] 4-6.
[26] Ratner 2001 *Yale Law Journal* 461- 462. It is interesting to note that one of the leading scholars on the issue of non-State actors and human rights, Andrew Clapham has a 613-page monograph on human rights obligations of non-State actors but nowhere is the concept defined. See Clapham *Non-State Actors* i-613.
[27] Clapham *Non-State Actors* 109-193.
[28] 109.

associations, universities, associations of churches and other confessional movements and cultural associations.[29]

Josellin and Wade have proposed what is ostensibly a comprehensive definition of the concept of non-State actor.[30] According to the criteria laid down by the two authors, any entity meeting the following three criteria qualifies to be regarded as a non-State actor. Firstly, an entity must be substantially or entirely autonomous from State funding and control.[31] Secondly, the organisation in question must operate or participate in networks which extend across State borders in the process engaging in transnational relations, linking socio-political systems and societies.[32] Under this criterion, entities engaged solely at the domestic level in one

[29] See *Communication from the European Commission to the European Council, the European Parliament and the European Economic and Social Committee COM* (2002) 598 para 1.2 <http://www.enpi-info.eu/enpidoc/content/commission-communication-participation-non-state-actors-eu-development-policy> (accessed 16.02.2012). The Cotonou Agreement of 2000 between the EU and African, Caribbean and Pacific States. Although that provision does not define non-State actors, it envisages cooperation between States and non-State actors such as the "private sector, economic and social partners, including trade union organisations, civil society in all its forms according to national characteristics" in developmental initiatives. See articles 4 and 6 of the Cotonou Agreement between the EU and African, Caribbean and Pacific States (2000) < http://www.bilaterals.org/IMG/pdf/Cotonou_1_body_-2.pdf> (accessed 16.02.2012). This issue is however not so clear-cut. Noteworthy is the South African constitution which defines an organ of State as, *inter alia*, any functionary or institution exercising a public power or performing a public function in terms of any legislation. See section 239(b)(ii) of the South African Constitution. In the South African case of *Balolo and Others v University of Bophuthatswana and Others*, the court adopted a broad meaning of the term "organ of State", noting that a university qualified as an organ of State as that term must include (i) statutory bodies; (ii) parastatals; (iii) bodies or institutions established by statute but managed and maintained privately, such as universities, law societies, the South African Medical and Dental Council, etc; (iv) all bodies supported by the State and operating in close cooperation with structures of State authority; and (v) certain private bodies or institutions fulfilling certain key functions under the supervision of organs of State. See *Balolo and Others v University of Bophuthatswana and Others* 1995 4 SA 230 (B). In *Inkatha Freedom Party and Anor v Truth and Reconciliation Commission and Others* 2000 3 SA 119 (C), the court stated that "the definition of organ of State in the 1996 Constitution expands the definition beyond such institutions for it includes within the definition those institutions or functionaries who might otherwise be outside the State but which exercise public power." The above position was further emphasised by the Constitutional Court in the case of *Independent Electoral Commission v Langeberg Municipality* where the Court found that the Independent Electoral Commission was an organ of State in terms of section 239 of the Constitution. This finding was based on the fact that the Independent Electoral Commission "exercises public powers and performs public functions in terms of the Constitution." See *Electoral Commission v Langeberg Municipality* 2001 3 SA 925 (CC). Geo Quinot has pointed out that:

> "[a]lthough the control test is the most important factor..[in determining whether an entity is a State organ], it is not the sole criterion. The public nature and statutory source of its functions remain contributing factors, especially to distinguish institutions of a commercial character under State control from other similar bodies under analogous private control." See G Quinot *State Commercial Activity: A Legal Framework* 64.

[30] See D Josselin & D Wallace "Non State Actors in World Politics: A Framework" in D Josellin & D Wallace (eds) *Non State Actors in World Politics* 1 3-4.

[31] 3.

[32] 4.

State are not part of the definition. The focus of Josellin and Wade's definition is limited to those entities with a transnational dimension.[33]

Josellin and Wade's definition is wide enough to encompass a wide range of actors. Its fundamental weakness is its exclusive focus on those actors with a transnational outlook. Such a definition excludes entities operating only at the domestic level. It is also not clear as to the level of State funding or the extent and nature of government control that might exclude an entity from the definition of a non-State actor.[34] It is however important to note that the term non-State actor is increasingly assuming a specific meaning according to the particular context in which it is used. Within the context of arms control, the International Campaign to Ban Landmines uses the term non-State actor to refer to such entities as rebel groups, irregular armed groups, insurgents, dissident armed forces, guerrillas and liberation movements.[35]

This dissertation will use the concept of non-State actor to refer to both MNCs and domestic corporations unless the context indicates otherwise. The main focus of this dissertation is on businesses such as MNCs and domestic businesses enterprises. MNCs and national corporations are key players in the privatisation of water services, either individually or in the form of consortia as illustrated in the Cochabamba and Dar es Salaam privatisation cases discussed above.[36] Furthermore, MNCs evoke particular concern in relation to global trends. MNCs are very active in some of the most important sectors of national economies such as extractive industries, health provision, agriculture and the provision of water services.[37] Other studies have focused on the human rights obligations of entities

[33] It is unclear why the two authors restrict the definition of non-State actors to entities engaging in transnational relations while excluding purely domestic entities.
[34] Senyongo "Non State Actors" in *Economic, Social and Cultural Rights* 112.
[35] Alston "Not a Cat Syndrome" in *Non State Actors and Human Rights* 14.
[36] See section 3 5 1 of chapter 3 above. In the Dar se Salaam privatisation case, two MNCs, Biwater International Limited, a British water multinational, and HP Gauff Ingenieure, a German corporation submitted a successful bid and proceeded to incorporate under Tanzanian law a local operating company, City Water. City Water in turn proceeded to enter into a concession agreement with DAWASA, the State regulatory agency. In Bolivia, the consortium which won the concession to manage the Cochabamba municipal water system involved MNCs led by International Water Limited (England), the utility firm Edison (Italy), Bechtel Enterprise Holdings (USA), Abengoa (Spain) and two local corporations from Bolivia, ICE Ingenieros and the cement maker SOBOCE.
[37] D Weissbrodt & M Kruger "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97 *American Journal of International Law* 901 909.

such as the World Bank and IMF,[38] but these institutions will not be discussed within the limited scope of this chapter.

It was noted in chapter 3 that privatisation and trade liberalisation has seen the emergence of powerful MNCs with resources greater than those of many States.[39] Although the term MNC is often used in literature on non-State actors, the United Nations (hereinafter referred to as the "UN") system tends to use the term Transnational Corporations (hereinafter referred to as "TNCs"). This dissertation will not distinguish between these terms and will use them interchangeably to refer broadly to any economic entity, whatever its legal form, operating in more than one country.[40] Significantly, much of the discussion relating to MNCs will be applicable and of relevance to domestic corporations generally. Although the adjective "transnational" or "multinational" can be employed to emphasise different characteristics of certain corporations, it does not really change the nature of the corporation as a legal entity.[41] The term corporation will thus be used loosely to refer to both MNCs and domestic business enterprises.

It is likely that larger corporations may be expected to have greater responsibilities with regard to human rights obligations in general and the right to water in particular since they are the dominant players in the water industry. Nevertheless, there is no logical reason to omit national corporations for the purposes of discussing obligations of non-State actors with regard to the right to water. Significantly, the OECD Guidelines for Multinational Enterprises (hereinafter referred to as the "OECD Guidelines") state that the same expectations from MNCs are relevant to both multinational and domestic enterprises.[42] The International Labour Organisation Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (hereinafter referred to as the "ILO Tripartite Declaration") is also equally applicable to MNCs and domestic corporations. It specifically states that:

---

[38] See generally F Gianviti "Economic, Social, and Cultural Rights and the International Monetary Fund" in P Alston (ed) *Non-State Actors and Human Rights* 113-138; SI Skogly *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001).

[39] D Shelton "Protecting Human Rights in a Globalised World" 2002 (25) *Boston College International and Comparative Law Review* 273 273.

[40] Alston "Not-a-Cat' Syndrome" in *Non-State Actors* 1-36.

[41] Clapham *Non State Actors* 201.

[42] See Organisation for Economic Cooperation and Development *OECD Guidelines: Concepts and Principles* (2011) para 5 <http://dx.doi.org/10.1787/9789264115415-en> (accessed on 10.02.2012).

> "The principles laid down in this Declaration do not aim at introducing or maintaining inequalities of treatment between multinational and national enterprises. They reflect good practices for all. Multinational and national enterprises, wherever the principles of this Declaration are relevant to both, should be subject to the same expectations in respect of the their conduct in general and their social practices in particular"[43]

5 1 2 Questioning the State-centric focus of human rights

States are the primary duty bearers for the full range of human rights under the international human rights system hence the primary focus of accountability for the realisation of human rights.[44] The traditional international law approach conforms to the State-centric view of world politics. Such a system conceptualises the State as the primary actor in the international system, with international law principally perceived as a mechanism to regulate relations between States.[45] Such an approach is predicated on the idea that humankind is organised into territorially-defined discrete, political communities in which the State claims exclusive authority over and allegiance from the people.[46] The above approach ensures that only States are parties to international human rights treaties. It is therefore not surprising that only

[43] International Labour Organisation *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (2006) para 11 <http://www.ilo.org/wcmsp5/groups/public/---ed_pdf.> (accessed 15.04.2012).

[44] See Ratner 2001 *The Yale Law Journal* 461; See also J Oloka-Onyango "Reinforcing Marginalised Rights in an Age of Globalisation: International Mechanisms, Non State Actors and the Struggle for Peoples' Rights in Africa" (2002 – 2003) 18 *American University International Review* 815 815. See also section 4 1 2 in chapter 4 above; Senyongo "Non State Actors" in *Economic, Social and Cultural* 109. See also R McCorquodale "Human Rights and Global Business" in S Bottomley & D Kinley (eds) *Commercial Law and Human Rights* (2002) 89 92–94 emphasising the primary responsibility of States in maintaining international human rights law and that this obligation remains that of the government even if the violator is a non-State actor such as a corporation. See also S Joseph "Liability of Multinational Corporations" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 613 615-616 stating that "States have duties to respect, protect and fulfill human rights under international human rights law."

[45] A Cassese *International Law* (2001) 1. This State-centric focus of international human rights can be traced to the development of human rights. The State's dominant position and potential to abuse its position of authority to the detriment of individuals' interests was the basis for human rights to insulate the latter against State interference.[45] In this respect, human rights act as a shield to protect the freedom of the individual against unlimited State control, and are viewed primarily as being exercisable against the State. It therefore follows that all arms of government, be it the executive, legislature and judiciary are in a position to engage the responsibility of the State for any wrongful acts that violate the rights of groups or individuals. See Senyongo "Non State Actors" in *Economic, Social and Cultural Rights in Action* 109.

[46] See Wels & Elias "Corporate Complicity" in *Non-State Actors* 145.

States can be cited as respondents under treaty complaints mechanisms even in clear situations evidencing infringement of rights by a non-State actor.[47]

The above position is further buttressed by a 2011 statement released by the United Nations Committee on Economic, Social and Cultural Rights (hereinafter referred to as the "CESCR"). The CESCR stated that in terms of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the "ICESCR"),[48] States have the primary obligation to respect, protect and fulfill the rights of all persons under their jurisdiction in the context of corporate activities undertaken by State-owned or private enterprises.[49]

The position has been emphasised in the recently adopted United Nations Guiding Principles on Business and Human Rights (hereinafter referred to as the "UN Guiding Principles").[50] The former Special Representative to the Secretary General on "Human Rights and Transnational Corporations and Other Business Enterprises", John Ruggie explicitly stated in the UN Guiding Principles that States are the primary duty-bearers under international human rights law and trustees of the international human rights regime.[51] This position is further aptly captured in the 1993 Vienna Declaration and Programme of Action which provides that the promotion and protection of human rights "is first the responsibility of government."[52]

The State's duty to protect against violations of human rights by non-State actors is often raised as an argument against the need to recognise and impose

[47] See *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication No 155/96.
[48] International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316.
[49] According to the Committee on Economic, Social and Cultural Rights (CESCR), this results from article 2(1) of the ICESCR that defines the nature of the obligations of States Parties to the ICESCR, referring to legislative and other appropriate implementation steps, which include administrative, financial, educational, social measures, domestic and global needs assessments, and the provision of judicial or other effective remedies. See United Nations Committee on Economic, Social and Cultural Rights *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights* (2011) E/C.12/2011/1 para 3.
[50] See United Nations Human Rights Council *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprise: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011) UN Doc A/HRC/17/31 (UN Guiding Principles).
[51] See Commentary to Principle 2 of the UN Guiding Principles. The CESCR has stated that States are enjoined to guarantee conformity of their laws and policies regarding corporate activities with economic, social and cultural rights set forth in the ICESCR. In this respect, States are obliged to ensure that companies demonstrate due diligence to make certain that they do not impede the enjoyment of the Covenant rights by those who depend on or are negatively affected by their activities. See CESCR Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights para 4.
[52] Vienna Declaration and Programme of Action (1993) UN Doc AC/CONF.157/23.

direct human rights duties on non-State actors.[53] The current global economic trends towards privatisation and the withdrawal of the State in human rights sensitive services such as water discussed above have cast aspersions on the utility of relying solely on the State's duty to protect.[54] This approach is insufficient to protect against human rights breaches by non-State actors. This is particularly the case where non-State actors operate across State borders, as MNCs do, making it extremely difficult to attribute legal responsibility to a single State.[55] Protecting human rights through the mechanism of State obligations and concomitant State responsibility for violations of such obligations might seem uncontroversial if States represent the only threat to the enjoyment of human rights such as the right to water, health or education. This might also appear an easy obligation to fulfill if States could be counted on to effectively restrain non-State actors from violating human rights.

A system in which the State is the sole addressee of international human rights obligations may not be sufficient to effectively protect groups and individuals against infringement of their human rights by non-State actors.[56] Nowadays access to essential medicines, for example, is not only dependent on the policies and actions of the State but also on the decisions and policies of pharmaceutical corporations.[57] Significantly, banks and other financial institutions play a very significant role in ensuring access to housing.[58] Such actors are equally capable of abusing human rights, and creating barriers which prevent people from gaining access to rights such as health care, housing and water.

Privatisation and trade liberalisation has seen the emergence of non-State actors with powers akin to, and in some cases dwarfing those of States. These non-State actors are not only influencing State policies concerning the provision of social services but also directly participate in the provision of human rights sensitive goods such as water services.[59] John Ruggie put in succinctly when he stated that:

---

[53] Chirwa explains that "Central to the reluctance to recognise the obligations of non-State actors in relation to human rights is the age-old notion that human rights bind States only, not non-State actors." See Chirwa 2008) *African Human Rights Law Journal* 295.
[54] See chapter 3 above. See also McBeth's discussion on the issue, McBeth 2004 *Melbourne Journal of International Law* 143.
[55] 143.
[56] Ratner 2001 The *Yale Law Journal* 461.
[57] Chirwa 2004 *Melbourne Journal of International Law* 1.
[58] 1.
[59] Chirwa 2008 *African Human Rights Law Journal* 295.

> "Clearly, a more fundamental institutional misalignment is present: between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation. For the sake of the victims of abuse, and to sustain globalisation as a positive force, this must be fixed."[60]

The capacity of States to manage the adverse consequences of non-State actors' infringements of human rights is limited. Some MNCs have become such powerful global actors that a number of States, (particularly developing countries) may lack the resources or will to control them. Developing countries, in particular, may lack the necessary regulatory capacity or be unwilling to regulate MNCs in the conduct of their business activities.[61] Some States may have the necessary environmental and labour legislation but lack of monitoring and enforcement capacities may undermine the effectiveness of such laws.[62] Significantly, competition for direct foreign investment often creates a race to the bottom that limits how strictly some States may be willing to regulate and enforce existing environmental, labour and tax legislation against MNCs. Graham and Woods have pointed out that many developing States often view strengthening labour and environmental regulation as hampering economic growth due to the perception that stricter standards will discourage inflows of foreign direct investment in favour of States with lower environmental and labour standards.[63] In some cases, States go as far as soliciting corporations to cooperate in impinging human rights. This was clearly the case as determined by the African Commission in the *SERAC* case discussed in chapter 4.[64] Such realities cast aspersions on the utility relying exclusively on States' protective obligations against potentially harmful conduct of non-State actors.[65] The lack of willingness or inability of States to regulate non-State actors has therefore brought

[60] UN Human Rights Council *Business and Human Rights-Mapping International Standards* para 3.
[61] KW Abbot & D Snidal "Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit" (2009) 42 *Vanderbilt Journal of Transnational Law* 501 538.
[62] K Van Wezel Stone "To the Yukon and Beyond: Local Laborers in a Global Labor Market" (1999) 3 *Journal of Small & Emerging Business Law* 93 95. See also Abbot & Snidal 2009 *Vanderbilt Journal of Transnational Law* 538.
[63] D Graham & N Woods "*Making Corporate Self-Regulation Effective in Developing Countries*" (2006) 34 *World Development* 868 869.
[64] See section 4 3 5 2, chapter 4 above.
[65] Ratner 2001 *The Yale Law Journal* 461.

into sharp focus the lack of accountability of non-State actors for activities that interfere with human rights of individuals and groups.[66]

5 2 Necessity of imposing human rights obligations on non-State actors

Obligations imposed by international human rights law should extend to the private sphere in order to provide a normative and remedial framework for redressing abuse of human rights perpetrated by non-State actors. Clapham, for instance, has pointed out that:

> "The application of human rights in the private sphere squarely addresses the effectiveness of human rights protection and so goes some way to answering those critics who point to the empty formal nature of rights. The criticism is often based on the failure of a rights discourse to address all forms of oppression and suffering. This is particularly important in an era of powerful corporations, ambiguous State intervention, increasing privatisation, and racial and sexual violence."[67]

The imperative to impose direct human rights obligations on non-State actors, according to one commentator, is a practical necessity since rights are entitlements that must be respected by all.[68] It is noteworthy that human rights treaties are generally drafted by reference to specific entitlements, for example, the right of everyone to an adequate standard of living or the right to health.[69] McBeth argues that he impacts for the victim are the same whether the perpetrator is a State or non-State actor.[70] UN treaty bodies have recognised the significance of holding non-State actors for human rights abuses. Nevertheless, the treaty bodies have acknowledged their own limited mandate flowing from the provisions of the relevant treaties that

---

[66] Oloka-Onyango 2003 *American University International Law Review* 895. See also Senyonjo who states that

> "Making space in the international legal regime to take account of the role of non-State actors in the realisation of economic, social and cultural rights and their accountability for the violations of economic, social and cultural rights, remains a critical challenge facing human rights today. Under international approaches to human rights generally, and to socio-economic rights in particular, non-State actors are considered to be beyond the direct reach of international human rights law." See Senyongo "Non State Actors" *Economic, Social and Cultural Rights in Action* 109.

[67] A Clapham *Human Rights in the Private Sphere* (1993) 353.

[68] McBeth 2004 *Melbourne Journal of International Law* 143.

[69] See articles 11 and 12 of the ICESCR.

[70] McBeth 2004 *Melbourne Journal of International Law* 143. In support, see also Skogly who argues that "for the victims of human rights violations, the effects are the same whoever is responsible for atrocities." See Skogly *The Human Rights Obligations of the World Bank and the International Monetary Fund* 51.

permit them to only monitor State compliance with treaty obligations.[71] The CESCR has for instance observed within the context of the right to health that:

> "While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society — individuals, including health professionals, families, local communities, intergovernmental and nongovernmental organisations, civil society organisations, as well as the private business sector — have responsibilities regarding the realisation of the right to health."[72]

5 2 1 Limits to holding non-State actors accountable for human rights violations

International human rights law principally contemplates two sets of actors who may be held liable for violations of human rights. These are States through the concept of State responsibility and individuals through the concept of individual responsibility, which is primarily criminal.[73] This approach however relies on the presence of a sound domestic legal system that will ensure that non-State actors such as corporations are held directly or indirectly accountable for human rights.

It is easy to refer to the State's duty to regulate as part of obligation to protect, but it must not be underestimated that such regulation requires financial and human resources. This might be challenging for developing States where resource constraints present another difficulty for regulating and controlling the human rights sensitive activities of non-State actors.[74] It is also significant to note that in this era of globalisation, capital has become quite mobile. This often forces many States to compete for investment opportunities. The result is a rush to the bottom which results in the lowering of human rights standards to attract or retain investments. It is therefore difficult (if not impossible) to impose high levels of control and regulation on non-State actors without uniform international standards of regulation. It has for instance been pointed out within the context of the privatisation of water services that current estimates suggest that a State could save about 10 per cent of the total operation costs of the service if it were to effectively monitor the non-State actor operator.[75]

---

[71] 12.
[72] CESCR General Comment 14 para 42.
[73] Ratner 2001 *The Yale Law Journal* 461.
[74] 27.
[75] 27.

Relying on criminal responsibility is not adequate for the purposes of regulating corporations. Individual criminal responsibility applies to a smaller range of abuses such as war crimes and crimes against humanity.[76] However, the direct accountability of non-State actors before international adjudicative tribunals remains underdeveloped, something underlined by the International Criminal Court's lack of jurisdiction over corporations.[77]

The inadequacy of solely relying on the State's protective obligation under international human rights law has been highlighted by scholars. Susan Strange, for instance, has emphasised the significance of conceptualising power beyond political power to include economic power embedded in markets.[78] Non-State actors are increasingly influencing government policies concerning the provision of social services due to their immense power and influence. The limitations and obstacles attendant on the State's duty to protect means that other efforts aimed at fostering the accountability of non-State actors such as through legally enforceable direct human rights standards on non-State actors should not be abandoned.[79] The above clearly makes a strong case for imposing direct human rights obligations on non-State actors.

5 2 2 Limitations on holding corporations accountable under domestic jurisdictions

There is an emerging domestic practice recognising the applicability of human rights on binding non-State actors. Chirwa's study of the relevant jurisprudence from the US, Canada, Germany, South Africa and Ireland revealed an emerging trend demonstrating that non-State actors are increasingly being bound by human rights provided under the constitutions or applicable domestic laws of those countries.[80]

The South Constitution[81] expressly provides for the horizontal application of the Bill of Rights.[82] Section 8(1) provides that the Bill of Rights applies to all law and

[76] See SR Ratner & JS Abrams *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 2nd ed (2001) 13.
[77] Alston "Not-a-Cat Syndrome" in *Non-State Actors* 27.
[78] S Strange *The Retreat of the State* (1996) 16-43.
[79] Chirwa 2004 *Melbourne Journal of International Law* 28.
[80] See DM Chirwa *Towards Binding Economic, Social and Cultural Rights Obligations of Non-State Actors in International and Domestic Law: A Critical Survey of Emerging Norms* Phd dissertation University of the Western Cape (2005) 302-364.
[81] Constitution of the Republic of South Africa, 1996.
[82] Liebenberg has defined "horizontal application of the Bill of Rights" as referring to the applicability of the Bill of Rights in relations between private parties. See S Liebenberg "Adjudicating Socio-Economic Rights under a Transformative Constitution" in M Langford (ed) *Socio-Economic Rights: Emerging Trends in International and Comparative Law* (2009) 75 78 (footnote 29).

binds all organs of the State.[83] Section 8(2) of the South African Constitution provides that a provision in the Bill of Rights "binds a natural and juristic person if, and to the extent that, it is applicable taking into account the nature of the right and the nature of any duty imposed by the right." Furthermore, section 8(3) provides that whenever a court has to give effect to the horizontal application of a right in the Bill of Rights, it "must apply, or if necessary, develop the common law to the extent that legislation does not give effect to the right."[84] Section 39(2) is another important provision as it enjoins a court, tribunal or forum when interpreting any legislation, and when developing the common law or customary law "to promote the spirit, purport and objects of the Bill of Rights."[85] The above provisions create the possibility for socio-economic rights such as the right to water to apply in legal relations between private parties.[86]

The Malawian Constitution also envisages the direct application of constitutionally protected rights to private conduct or non-State actors.[87] Section 15(1) of the Malawian Constitution provides that the human rights protected in that document "shall be respected and upheld…where applicable to them, by all natural and legal persons in Malawi." Furthermore, section 12(iv) of the Malawian Constitution states that "all institutions and persons shall observe and uphold the constitution and the rule of law." Chirwa has explained that the above provisions of the Malawian Constitution envisage direct horizontal application and present the possibility of applying constitutional rights directly to the conduct of non-State actors.[88] A number of factors are important for determining whether a particular right can be applied to a non-State actor. It is important to have regard to the nature of the protected right in question, the language used by the constitution in identifying the

[83] For a discussion on the horizontal application of South Africa's Bill of Rights, see Liebenberg "Adjudicating Socio-Economic Rights" in *Socio-Economic Rights* 78-79; DM Chirwa *Towards Binding Economic, Social and Cultural Rights Obligations of Non-State Actors in International and Domestic Law: A Critical Survey of Emerging Norms* Phd dissertation University of the Western Cape (2005) 302 351-361 and D Bilchitz "Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations" (2008) 124 *South African Law Journal* 754 773-783

[84] Section 8(3).

[85] Liebenberg "Adjudicating Socio-Economic Rights" in *Socio-Economic Rights* 78.

[86] 78-79. South Africa's Constitutional Court has acknowledged that at least some of the duties imposed by socio-economic rights are binding on third parties. In Its decision of *Government of the Republic of South Africa and Others v Grootboom and Others*, the Constitutional Court held that section 26(1) imposes, at the very least a negative obligation "upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing." See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) Para 34.

[87] For a discussion see DM Chirwa "Human Rights under the Malawian Constitution" 2011 18-22.

[88] 18.

right, and the nature of the duties imposed by the right.[89] A significant number of rights such as non-discrimination, labour rights, children's rights and women's rights, are relevant to private relations and can be enforced against non-State actors.[90] Additionally, constitutions of Ghana,[91] Namibia,[92] Ghana,[93] The Gambia,[94] Lesotho[95] and Cape Verde[96] also expressly recognise that constitutional rights bind non-State actors. The recognition of binding human rights on corporations may assist in addressing some of the challenges posed by non-State actors.[97]

A University of Oxford study covering 13 national jurisdictions focusing on access to justice under the domestic laws of Australia, Canada, the Democratic Republic of Congo (DRC), the European Union, France, Germany, India, Malaysia, the People's Republic of China, Russia, South Africa, the United Kingdom and the United States illustrates the challenges for holding corporations accountable under domestic laws.[98] The study highlights the various substantive, procedural and practical obstacles in holding MNCs accountable under domestic jurisdictions. Victims of corporate abuse may face other challenges such as the cost of litigation, the logistics of bringing a claim in a foreign country, and access to relevant information. Victims may also lack the requisite legal knowledge and expertise to investigate potential causes of actions in foreign jurisdictions.[99] These factors make it difficult for victims of human rights abuses by corporations to obtain adequate and prompt compensation in the home States of MNCs.[100] The study showed that

---

[89] 18.
[90] 18.
[91] Section 12(1) of the Constitution of Ghana (1992) and section 15(1) of the Constitution of Malawi (1994) contain a similar provision. They both provide that:

> "The human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies, and where applicable to them, by all natural and legal persons and shall be enforceable by the courts."

[92] Article 5.
[93] Article 12(1).
[94] Section 5(1)(b) of the Constitution of The Gambia (1997) provides that a person who alleges that "any omission of any person or authority is inconsistent with or is in contravention of a provision of this act or Constitution, may bring an action in a court of competent jurisdiction for a declaration to that effect."
[95] Section 4(2).
[96] See article 18 of the Constitution of Cape Verde (1990) which provides that "Constitutional norms regarding rights, liberties and guarantees shall bind all public and private entities and shall be directly enforced."
[97] 26.
[98] See generally Oxford Pro Bono Publico *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse* (2008) i.
[99] iii.
[100] iii

existing criminal and civil laws do not directly refer to human rights and do not generally have extraterritorial operation.[101] This makes it difficult in human rights litigation undertaken against corporations.

There are also significant challenges in attempting to obtain redress in the MNC's home State. The key challenge is the non-extraterritorial application of the domestic laws of most States which are not intended to operate outside of the State in which they are enacted.[102] This poses a significant obstacle in holding MNCs accountable in their home States for wrongful activities committed against individuals or communities in host States.[103] Furthermore, claimants may have to contend with the potential conflict of laws of each home State in order to establish the jurisdiction of the home State's courts to adjudicate over the claim.[104] Significantly, even where claimants may establish jurisdiction under the domestic law of the host or home State, the claim may be challenged on the basis of the *forum non conveniens* - that the home State is not the appropriate forum to adjudicate the claim against the corporation.[105]

Survivors and relatives of the dead in the 1984 Bhopal Tragedy, represented by the Indian government, sought compensation in the United States against Union Carbide corporation in the wake of the disaster. The argument of *forum non conveniens* was highlighted by Keenan J of the New York District Court in the case. The judge dismissed the claim against Union Carbide on the grounds that the Indian connection with the case far outweighed the interests of citizens of the United States in the matter hence the United States courts were an inconvenient forum.[106] In a claim filed under the United States of America (hereinafter referred to as the "US")'s Alien Tort Claims Act in *Sequihua v Texaco*, the Court of Appeals for the Second Circuit dismissed the claim against Texaco filed by Ecuadorian plaintiffs on the basis of *forum non conveniens*.[107] The court proceeded to point out that there were crucial factors pointing to the selection of Ecuador as a more appropriate forum than Texas. These, according to the court, included access to evidence and witnesses, the possibility of inspection, the cost of travel between Ecuador and the United States

[101] ii.
[102] ii.
[103] ii.
[104] ii.
[105] iii.
[106] *In Re Union Carbide Corp Gas Plant Disaster at Bhopal* 634 F Supp 842 (SDNY 1986) 866.
[107] *Sequihua* v *Texaco* 847 F Supp 61 (1994) 63–65.

and the uncertainty of whether a ruling handed down in Texas would be enforced in Ecuador.[108] In the *Wiwa* v *Shell* case, the United States District Court for the Southern District of New York, in 1998, dismissed the case on the grounds of *forum non conveniens*.[109] The Court of Appeals for the Second Circuit, however, reversed the district court's dismissal on *forum non conveniens* grounds, holding that the US was a proper forum for adjudicating the case.[110] The Court of Appeals for the Second Circuit, in reaching this decision, cited as a factor the United States' strong public interest in adjudicating international human rights litigation.[111]

It is also important to note that even in those cases where victims of human rights abuses by corporations obtain redress, a study of the above jurisdictions reveals that not a single case has ever been determined in favour of foreign litigants.[112] Significantly, all cases in which complainants have received compensation have resulted from out-of-court settlements. For instance, out-of-court settlements were reached in such cases as *Wiwa et al v Dutch Petroleum Company et al*, *Doe v Unocal*[113] in the United States, *Lubbe and Others v Cape Plc*[114] in the United Kingdom and *Dagi v BHP* in Australia.[115] In the case of *Lubbe v Cape Plc,* court-sanctioned settlement trusts have been established which will grant compensation to existing and future claimants though such cases are in the minority.[116]

The practice of out-of-court settlements before disputes are determined by a court, while benefiting the claimants in a case, impact upon the development of jurisprudence and precedent in human rights litigation against corporations. What is clear is that out of court settlements prevent the development of a settled body of law relating to the human rights obligations of corporations. The uncertainty as to whether victims of corporate human rights abuses may actually obtain final judgment in such cases may operate as an obstacle to such victims launching actions. This

[108] 63–65.
[109] See *Wiwa v Royal Dutch Petroleum* 101 cert den'd 532 US (2001) 941.
[110] See *Wiwa v Royal Dutch Petroleum*.
[111] See *Wiwa et al v Royal Dutch Petroleum et al* (SDNY) (No 96 Civ. 8386).
[112] iv.
[113] *John Doe et al v UNOCAL Corporation et al* 395 F.3d 932 (9 Cir. 2002).
[114] *Lubbe et al v Cape Plc* (2000)1WLR1545).
[115] Dagi *v Broken Hill Proprietary Company Limited* (No 2) (1997) 1 VR 428.
[116] Oxford Pro Bono Publico *Obstacles to Justice* iv.

may provide incentives for other claimants to go for meagre out-of-court settlements.[117]

5 2 3 Is international human rights law applicable to non-State actors?

The question of the human rights obligations of non-State actors under international law has been at the heart of academic discussion over the last twenty years.[118] Human rights theory and practice has increasingly questioned the utility of solely relying on State responsibility to address the challenge posed on human rights by non-State actors. It has been suggested that, in some circumstances, human rights already give rise to directly enforceable duties on non-State actors although this may not be the case for all human rights in all circumstances.[119] Some of the core UN human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter referred to as the "ICERD"),[120] the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the "ICESCR"), and the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR"),[121] do not expressly impose duties on non-State actors such as corporations. They impose generalised obligations on States to ensure the enjoyment of rights and to prevent abuse by non-State actors of the protected rights.

The ICERD requires that each State party prohibit racial discrimination by "any persons, group or organisation."[122] Some human rights treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter referred to as "CEDAW"), the Convention on the Rights of the Child (hereinafter referred to as "CRC")[123] and the International Convention on the Protection and Promotion of the Rights of Persons with Disabilities[124] do appear to directly address the responsibilities of non-State actors. A closer look however, shows that such instruments do so through the prism of the State's duty to protect.

---

[117] iv.
[118] Clapham *Non State Actors* 2. See also Human Rights Council *Business and Human Rights-Mapping Report* para 33
[119] 2.
[120] International Convention on the Elimination of All Forms of Racial Discrimination 660 (1965) UNTS 195.
[121] International Covenant on Civil and Political Rights UN Doc A/6316 (1966).
[122] See ICERD art 2(1)(d).
[123] Convention on the Rights of the Child (1989) UN Doc A/44/49.
[124] International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (2006) UN Doc A/61/49.

The CEDAW, for example, requires States to take all appropriate measures to eliminate discrimination against women by any enterprise[125] in the context of bank loans, mortgages and other forms of financial credit.[126] The section below analyses some of the provisions from human rights instruments which have been referenced as being a source for potentially binding human rights duties on non-State actors.

5 2 3 1 The Universal Declaration of Human Rights

It has been argued that international human rights law clearly envisages a role for non-State actors in the realisation of human rights.[127] The Universal Declaration of Human Rights (hereinafter referred to as the "UDHR") laid the normative framework for the subsequent human rights instruments adopted after 1948. The UDHR arguably establishes the basis of human rights responsibilities for non-State actors. The preamble to the UDHR provides that:

> "The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end *that every individual and every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance (emphasis added)."

One of the contentions is that "organs of society" in the sense as used in the preamble to the UDHR encompass businesses since such entities clearly play crucial social and economic functions in society in the distribution of resources.[128] Louis Henkin, a notable international law scholar, argued that the notion of every individual and organ of society in the UDHR includes corporations. Henkin further argued for the applicability of the UDHR on MNCs, pointing out that:

> "At this juncture the Universal Declaration may also address multinational companies. This is true even though the companies never heard the Universal Declaration at the time it was drafted. The Universal Declaration is not addressed only to governments.

[125] See Convention on the Elimination of All Forms of Discrimination Against Women (1979) UN Doc A/34/46 art 2(e).
[126] Art 13(c).
[127] McBeth 2004 *Melbourne Journal of International Law* 143.
[128] It has been pointed out that such an approach "is especially true for companies or other legal persons that are artificial constructs created in law as a way of organising commerce, to encourage investment and reduce risk." See International Council on Human Rights Policy *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002) 58.

> It is a 'common standard for all peoples and all nations.' It means that '*every individual and every organ of society* shall strive – by progressive measures … to secure their universal and effective recognition and observance among the people of the member States.' Every individual includes juridical persons. *Every individual* and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.[129]"

Other notable provisions include article 29 of the UDHR which provides that everyone has "duties to the community." Article 30 prohibits groups or persons from engaging in any activity aimed at the destruction of any of the rights protected in the UDHR. Article 30 of UDHR could equally apply to any individual or groups, including corporations who may potentially infringe the rights protected in the UDHR.[130] The broad human rights provisions contained in the UDHR have since been incorporated in legally binding form in many international human rights instruments though there are no specific obligations imposed on corporations.[131]

Although Henkin is correct that the UDHR's aspirations and moral claims were addressed and apply to all humanity, Ruggie has argued that such does not equate to legally binding effect.[132] The problem with the above provisions of the UDHR is that although they make reference to individual duties, they are silent on what precisely the ambits of these duties are.[133] It is also worth noting that the duties are owed to the community and not to specific human rights holders. The lack of subsequent State practice and *opinion juris* makes it rather doubtful that the above provisions of the UDHR and customary law emanating from it create binding human rights obligations on non-State actors as MNCs.[134]

---

[129] L Henkin "The Universal Declaration at 50 and the Challenge of Global Markets" (1999) 25 *Brooklyn Journal of International Law* 24 25.
[130] International Council *Beyond Voluntarism* 60.
[131] SC McCaffrey "A Human Right to Water: Domestic and International Implications"1992 (5) *Georgetown International Environmental Law Review* 1 8.
[132] Human Rights Council *Business and Human Rights-Mapping Report* para 37.
[133] JA Hessbruegge "Human Rights Violations Arising from Conduct of Non-State Actors" (2005) 11 *Buffalo Human Rights Law Review* 21 35.
[134] Hessbruegge has further argued that para 10 of the UDHR should not necessarily be understood to extend obligations under the UDHR to non-State actors. Hessbruegge further states that it is equally conceivable that the UDHR tasks "every individual and every organ of society" to strive to ensure that States continue to adhere to their human rights obligations." After all, the UDHR states quite clearly that "Member States have pledged themselves to achieve …the promotion of the universal respect for and observance of human rights and fundamental freedoms." See Hessbruegge 2005 *Buffalo Human Rights Law Review* 35.

The UDHR,[135] as a General Assembly resolution is not binding *per se*.[136] However, its most fundamental provisions are generally thought either to have crystallised into customary international law or to constitute an authoritative interpretation of the UN Charter obligations.[137] It is therefore widely accepted that some provisions of the UDHR have become binding customary international law on States though it is unclear which provisions of the UDHR have now attained the status of customary law. Furthermore, if the UDHR is going to be interpreted as imposing direct human rights obligations, such an assertion may be challenged on the grounds that States are the only addressees of international human rights treaties. Adherents of the State-centric approach will thus challenge any notion that the UDHR imposes direct human rights obligations on non-State actors. The emphasis is mostly on the State's duty to protect against any deleterious activities of such non-State actors which impinges on human rights.

5 2 3 2 Other provisions in international instruments

The ICCPR and the ICESCR both expressly declare in their preambles that the individual is under responsibility to strive for the promotion and observance of the rights recognised in those instruments. Similarly, common article 5(1) to both the ICESCR and ICCPR use language identical to article 30 of the UDHR, providing that:

> "[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognised herein, or at their limitation to a greater extent than is provided for in the present Covenant."

[135] See chapter 2 above, section 2 5 2 3.

[136] See A Eide (ed) *The Universal Declaration of Human Rights*: *A Commentary* (1992). Although this Commentary does not expressly contend that the UDHR has acquired the status of binding customary law, the Commentary conceives of the UDHR as a serious document with enormous legal repercussions. State officials, judges, lawyers and human rights advocates have invoked some of the provisions and often accepted them as binding. See HH Koh *Transnational Public Law Litigation* (1991) 100 *The Yale Law Journal* 2347 2366. See also Brownlie who has referred to the UDHR as a "good example of an informal prescription given legal significance by the actions of authoritative decision-makers." See I Browlie *Principles of Public International Law* (2003) 535. Navar has also pointed out that "[a]t the present time, though, to say that the Universal Declaration has no legal effect is to deny the potency and creative force it has amply demonstrated over the years since its adoption." See MGK Nayar "Human Rights: The United Nations and United States Foreign Policy" (1978) 19 *Harvard International Law Journa*l 813 815–816. Gleick further notes that, although not legally binding, such declarations often either express already existing norms of customary international law or, as in the case of some of the fundamental rights provisions in the UDHR, may over time crystallise into customary norms. See P Gleick "The Human Right to Water" 1999 (1) *Water Policy* 487 503.

[137] SC McCaffrey "A Human Right to Water: Domestic and International Implications" 1992 (5) *Georgetown International Environmental Law Review* 1 8. Gleick also supports such a position, see Gleick 1998 *Water Policy* 490.

Similar provisions are contained in the American Declaration on the Rights and Duties of Man,[138] the European Convention on Human Rights,[139] the American Convention on Human Rights,[140] and the African Charter on Human and People's Rights.[141] Article 28 of the African Charter on Human and People's Rights requires that "every individual shall have a duty to respect and consider his fellow beings." Article 20 of the African Charter on the Rights and Welfare of the Child imposes duties on parents towards their children.[142] Article 24 of the ICCPR grants every child "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." Such measures include an obligation "to ensure that children do not take a direct part in armed conflicts."[143]

It is arguable that the above provisions are merely guidelines for the behaviour of both States and non-State actors, and should not be considered as imposing any direct accountability on non-State actors.[144] Treaty monitoring bodies, for instance, in their interpretive work have avoided any mention of direct human rights obligations on non-State actors even in clear abuse of human rights by such actors as evidenced in the *SERAC v Nigeria* case discussed in chapter 4.[145] Rather, treaty monitoring bodies have been limited to emphasising the State's duty to protect and this has been emphasised in various general comments of the CESCR.[146]

---

[138] American Declaration of the Rights and Duties of Man (1948) OEA/Ser.L.V/II.82 doc.6 rev.1 articles 29-30.
[139] Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 222, article 10(2).
[140] American Convention on Human Rights (1969) 1144 UNTS 123 articles 13, 17 and 32.
[141] African Charter on Human and People's Rights (1981) OAU Doc. CAB/LEG/67/rev.5 articles 27-29.
[142] See African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/LEG/24.9/49.
[143] See ICCPR article 24.
[144] Senyongo "Non State Actors" in *Economic, Social and Cultural Rights in Action* 125.
[145] See Chapter 4 section 4 3 5 2 above.
[146] The role for non-State actors under international human rights treaties has also been noted in the General Comments of treaty-monitoring bodies in relation to the rights to water (General Comment 15 paras 27, 33, 49 & 50), freedom from discrimination(United Nations Committee on the Elimination of Racial Discrimination *General Recommendation XX on Article 5 of the* Convention (1996) UN Doc A/51/18 (1996) para 5), freedom of movement (Human Rights Committee, General Comment 27: Freedom of Movement (1999) UN Doc CCPR/C/21/Rev.1/Add.9 para 6), adequate housing, (CESCR *General Comment 4: The Right to Adequate Housing* (1991) UN Doc E/1992/3 (13 December 1991) para 14), adequate food (CESCR General Comment 12: The Right to Adequate Food (1999) UN Doc E/C.12/1999/5 paras 20, 27 &29), education, (CESCR General Comment 13 (1999) paras 41, 54 and 59), s the rights of women (CEDAW, General Recommendation 19 on Violence against Women (1992) UN Doc A/47/38 para 9), indigenous people (CERD, General Recommendation on the Rights of Indigenous Peoples (1997) UN Doc A/52/18 para 3), and disabled persons (CESCR General Comment 5 on Persons with Disabilities (1994) UN Doc E/1995/22 paras 11 & 12)

5 2 3 3 International criminal law

States have accepted the idea of duties of non-State actors through the corpus of international criminal law. Individuals have criminal responsibility in respect of international crimes such as war crimes, genocide, crimes against humanity, torture, slavery, forced labour, apartheid, and forced disappearances.[147] The International Military Tribunals established after World War II was the first to confirm that individuals carry responsibility for crimes against peace, war crimes, and crimes against humanity.[148] The adoption in 1998 of the Rome Statute for an International Criminal Court (hereinafter referred to as the "Rome Statute") has clarified the international obligations that attach to individuals, both State and non-State actors in different types of armed conflict.[149] The Rome Statute further elaborates on the individual criminal responsibility of non-State actors for war crimes and crimes against humanity.[150]

These mechanisms of accountability have served to dissipate much of the confusion and doctrinal debate which surrounded the issue of international human rights obligations of non-State actors in conflict and non-conflict situations. While the Nuremberg Charter required State involvement in a crime against humanity,[151] this is no longer a pre-requisite for a crime against humanity under the Rome Statute.[152] Specific crimes against the human person, such as slavery have never required State involvement. Non-State actors can commit these crimes. The Rome Statute is clear that crimes against humanity can be committed by both State and non-State

[147] Paust has, for instance, identified numerous cases in which individuals have had civil and criminal responsibility under customary and treaty-based international law. Paust argues that at least for the last 250 years public and private individual actors can be prosecuted for various types of crimes under international law, including piracy, war crimes, breaches of neutrality, territorial infractions, aggression, unlawful capture of vessels, the slave trade, violence against foreign ministers and officials, poisoning, assassination, professional arson, counterfeiting of foreign currency, banditry and brigandry terroristic publications, violation of passports, and violation of safe-conducts. JJ Paust "Nonstate Actor Participation in International Law and the Pretence of Exclusion" (2011) 51 *Virginia Journal of International Law* 977 984.

[148] See generally JJ Paust "Human Rights Responsibilities of Private Corporations" (2002) 35 *Vanderbilt Journal of Transnational Law* 80-825.

[149] See Rome Statute of the International Criminal Court (2002) 2187 UNTS 90.

[150] Some treaties make an individual criminally responsible only if he was an agent of the State or some other entity controlling territory: See art. II of the Inter-American Convention on the Forced Disappearance of Persons (1994) 33 ILM 1529, 1530; art. 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85.

[151] See article 6 of the Charter of the International Military Tribunal (Nuremberg Charter) (1945) <http://www.cfr.org/human-rights/charter-international-military-tribunal/p26372> (accessed 16.02.2012).

[152] Hessbruegge 2005 *Buffalo Human Rights Law Review* 43.

actors.[153] It is also noteworthy that the conference delegates at the drafting of the Rome Statute considered the possibility of giving the International Criminal Court jurisdiction over corporations. The proposal was withdrawn and did not make it in the final text of the treaty.[154] This is often cited as proof that the conference delegates had accepted in principle that international criminal law applies to legal persons.[155]

The non-inclusion of corporate responsibility in the Rome statute is perhaps an indication that at the time of the drafting of that treaty, there was no general acceptance of corporate criminal responsibility in international law. However, this does not mean that such an evolution cannot be envisaged. A significant number of national legal systems impose criminal responsibility on corporations as indicated above. It would not require much creativity to impose such criminal responsibility on corporations under international law. Inspiration can be derived from the fact that individuals bear criminal responsibility under international criminal law. This is despite the fact that such individuals do not necessarily possess legal personality under international law.

5 2 4 Conclusion

The above section discussed the State-centric nature of the contemporary international human rights system. It is clear that the primary focus of accountability for human rights is the State. However, it was argued that an exclusive focus on the State as the sole bearer of human rights obligations is inadequate. Privatisation and liberalisation have seen the emergence of non-State actors with immense powers, in some cases dwarfing those of the State. This is the reality in many spheres, including in the provision of basic services such as water. Some non-State actors have become so powerful that States may neither have the resources nor the will to control them even though their activities impinge on human rights obligations of States. In such situations, the State's duty to protect against abuse of the right to water by non-State actors such as corporations in situations of water privatisation is greatly curtailed. The following section discusses and analyses the emergence of global soft

[153] Clapham *Non State Actors* 2

[154] See United Nations *Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, Report of the Preparatory Committee on the Establishment of an International Criminal Court* (1998) UN Doc/A/Conf.183/2/Add.1 articles 23.5-23.6.

[155] Hessbruegge 2005 *Buffalo Human Rights Law Review* 44.

law initiatives attempting to impose human rights responsibilities on non-State actors and the usefulness of such mechanisms for holding corporations accountable for the right to water.

5 3 Global initiatives to impose human rights responsibilities on non-State actors

5 3 1 Introduction

The move towards imposing direct human rights obligations on MNCs at the international level began in the 1970s.[156] The impetus derived mainly from the newly independent States which sought to assert their rights to economic independence. They also wanted to avoid political interference in their domestic affairs by powerful MNCs.[157] In the 1960s and 1970s, attention began to focus on the role of MNCs in sustaining systematic human rights abuses and interference with local political processes especially in developing countries.[158] The period witnessed significant calls for tighter regulation against the backdrop of instances of interference by MNCs in the domestic politics of host countries. A notable incident was the involvement of a US entity, ITT Corporation in the overthrow by military coup of Chilean President Salvador Allende in 1973.[159] The insistence on an improved control of the activities of MNCs was accompanied by developing States' call for a new international economic order.[160] Developing States sought recognition of their permanent sovereignty over natural resources within their territories and on the need to improve the supervision of MNCs' activities.[161]

Some of the earliest international efforts towards holding MNCs accountable include the 1976 Organisation on Economic Corporation and Development (hereinafter referred to as "OECD")'s Declaration and Decisions on International Investment and Multinational Enterprises, the 1977 Sullivan Principles on

[156] PT Muchlinski "Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD' in MT Kamminga & S Zia-Zarifi (eds) *Liability of Multinational Corporations under International Law* (2000) 97 98.
[157] 98.
[158] CJ Dias "Corporate Human Rights Accountability and the Human Right to Development: The Relevance and Role of Corporate Social Responsibility" (2011) 4 *JUJS Law Review* 495 496.
[159] L Turner "Multinational Companies and the Third World" (1974) 30 *The World Today* 394 396-397.
[160] See generally SJ Rubin "Economic and Social Rights and the New International Economic Order" (1986) 1 *American University Journal of International Law and Policy* 67-96.
[161] See the resolution adopted by the General Assembly of the United Nations on 1 May 1974, calling for a New International Economic Order (UN Doc A/Res/3201 (S-VI)).

Apartheid,[162] the International Labour Organisation (hereinafter referred to as "the ILO")'s 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the UN's Draft Code of Conduct for Transnational Corporations initiated in the 1970s and concluded in 1992. While these initiatives may have had only limited effects on corporate behaviour, they played a crucial role in establishing normative expectations for corporate accountability.[163]

One of the earliest attempts at establishing binding obligations on MNCs was the UN's Commission on Transnational Corporations created by the Economic and Social Council in 1974 with a mandate to draft a UN Code of Conduct on TNCs.[164] The resulting draft UN Code of Conduct on TNCs was the first attempt at the UN level to usher in binding norms to regulate the activities of MNCs. The draft UN Code of Conduct on TNCs provided, *inter alia*, that:

> "Transnational Corporations shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational Corporations shall conform to government policies designed to extend equality of opportunity and treatment."[165]

[162] The Sullivan Principles were originally adopted as a code of conduct for US corporations doing business in South Africa adopted in 1977. The Reverend Leon Sullivan, a Black Baptist minister and member of the board of directors of the General Motors Corporation launched the original Sullivan Principles in 1977. The Sullivan Principles were designed to help persuade US corporations with investments in South African to treat their African employees the same as they would their American counterparts. The original code had six principles that became known as the Sullivan Principles. These called for the desegregation of the workplace, fair employment practices for all employees, equal pay for equal work, job training and advancement of Blacks, increasing the number of Blacks in management, and the improvement of the quality of workers' lives outside of the work- place. In 1984, the code was revamped to influence other MNCs operating in South Africa to follow similar equal rights principles and support the end of all apartheid laws. The Sullivan Principles were relaunched in 1999 as the Global Sullivan Principles for Corporate Social Responsibility. See MP Mangaliso "Corporate Social Responsibility and the Sullivan Principles" (1997) 28 *Journal of Black Studies* 219 238.

[163] W Mwangi, L Rieth & H Peter Schmitz "Encouraging Greater Compliance: Local Networks and the United Nations Global Compact (UNGC) in T Risse, S Ropp & K Sikkink (eds) *From Commitment to Compliance: The Persistent Power of Human Rights* (2011) 6 (forthcoming) <http://papers.ssrn.com/sol3/papers> (accessed 23.06.2012).

[164] The Commission on Transnational Corporations was established after a report from an expert group to the UN Economic and Social Council. See UN ECOSOC *The Impact of Multinational Corporations on the Development Process and on International Relations*, Report of the Group of Eminent Persons to Study the Role of Multinational Corporations in Development and in International Relations (1974) UN Doc E/5500/Rev.1/Add1.

[165] Para 14.

Disagreements ensued between the industrialised countries and the developing countries which resulted in failure to adopt the envisaged instrument.[166] The capital exporting States where most of the MNCs are headquartered wanted an instrument that could be used primarily as a means of protecting MNCs against discriminatory treatment contrary to international minimum standards accepted by these States. Countries belonging to the Group of 77, supported by the then socialist States, on the other hand, wanted to use the instrument as a means of subjecting the activities of MNCs to greater regulation.[167] This resulted in an impasse, leading to the abandonment of the initiative in 1992.[168]

The failure to adopt the draft code led to a shift of international efforts from the development of binding obligations on corporations to the adoption of voluntary and non-voluntary initiatives on corporate social responsibility. At the international level, the demands of developing countries have not resulted in the adoption of any binding human rights standards for corporations. On the contrary, a range of non-binding initiatives have since been developed in an attempt to impose human rights responsibilities on non-States actors. Some of the key initiatives are the Organisation for Economic Cooperation and Development's Guidelines for Multinational Enterprises (hereinafter referred to as the OECD Guidelines),[169] the ILO Tripartite Declaration of Principles, the UN Norms on the Responsibilities of Transnational Corporations (hereinafter referred to as "the Norms on TNCs")[170] and the UN Global Compact.[171] These initiatives have been widely discussed in literature hence this

[166] See W Spröte "Negotiations on a United Nations Code of Conduct on Transnational Corporations" (1990) 33 *German Yearbook of International Law* 331-348.
[167] Muchlinski "Accountability" in *Liability of Multinational Corporations* (2000) 100.
[168] Chirwa 2006 *South African Journal of Human Rights* 79.
[169] Organisation for Economic Cooperation and Development *OECD Guidelines for Multinational Enterprises* (2011) 3 <available online at http://www.oecd.org/dataoecd/43/29/48004323.pdf> (accessed 18.04.2012). The OECD Guidelines have been adopted by the thirty-four OECD member states as well as Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania.
[170] UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2.
[171] The then UN Secretary General, Kofi Annan, proposed the adoption by corporations of a global compact in 1999. The Global Compact involves different non-State actors mainly in the private sector. Additionally, six specialised UN agencies, the International Labour Organisation, the United Nations Development Programme, the United Nations Environment Programme, the Office of the High Commissioner for Human Rights, and the United Nations Industrial Development Organisation actively participate in the UN Global Compact (hereinafter referred to as the "Global Compact"). In addition non-governmental organisations, labour associations, business associations, think tanks and government representatives are part of the initiative. As of April 2012, the Global Compact reported that it had over 8700 corporate participants from across 130 countries, which it claims is the largest voluntary corporate initiative in the world. The global compact requires MNCs to commit to ten core principles within their spheres of influence. Two of the principles deal with human rights, four with labour standards, three with environmental standards and one with anti-corruption. The Global

chapter will not conduct an in-depth discussion and analysis of such initiatives.[172] Rather, the chapter will attempt to draw accountability mechanisms provided in those instruments that are of specific relevance to water privatisation.

Other key initiatives adopted by the UN Human Rights Council include: the UN Protect, Respect and Remedy: A Framework for Business and Human Rights adopted in 2008 (hereinafter referred to as "the UN Framework");[173] the UN Human Rights Council adopted the UN Guiding Principles 2011 to operationalise the UN Framework;[174] the UN Global Compact Chief Executive Officer Water Mandate (hereinafter referred to as the "CEO Water Mandate") is a corporate-driven initiative housed within the UN Global Compact launched in 2007.[175] These State-backed,

---

Compact explicitly states that the principles are derived from the UDHR, the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption. The first two principles make explicit reference to human rights. They provide that "[b]usinesses should support and respect the protection of internationally proclaimed human rights within their spheres of influence" and "make sure that they are not complicit in human rights abuses." See Principle 1 of the UN Global Compact provides that "Businesses should support and respect the protection of internationally proclaimed human rights" while Principle 2 enjoins corporations to "make sure that they are not complicit in human rights abuses." For a discussion and analysis of the UN Global Compact, see Chirwa (2006) *South African Journal of Human Rights* 89-92; Bilchitz *The South African Law Journal* 759 & S Joseph "Liability" in *Social Rights Jurisprudence* 617.

[172] Chirwa 2006 *South African Journal of Human Rights* 76-98; PT Muchlinski *Multinational Enterprises and the Law* (1999); Skogly *The Human Rights Obligations of the World Bank and the International Monetary Fund*; Joseph "Liability of Multinational Corporations" in *Social Rights Jurisprudence* 613-627; D Bilchitz "Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations" (2008) 124 *South African Law Journal* 754-789; D Weissbrodt & M Kruger "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights" (2003) *American Journal of International Law* 901-922; P Bernhagen "The Private Provision of Public Goods: Corporate Commitments and the United Nations Global Compact" (2010) 54 *International Studies Quarterly* 1175–1187; S Deva "Global Compact: A Critique of the UN's 'Public-Private' Partnership for Promoting Corporate Citizenship" (2006) 34 *Syracuse Journal of International Law and Commerce* 107-151 and A Rasche & G Kell (eds) *The United Nations Global Compact: Achievements, Trends and Challenges* (2010).

[173] See UN Human Rights Council *A Framework for Business* paras 47-49.

[174] See UN Human Rights Council *Guiding Principles on Business* para 47.

[175] See UN Global Compact CEO Water Mandate <http://www.unglobalcompact.org/Environ/CEO> (accessed 13.05.2012). The CEO Water Mandate is a corporate-driven initiative housed within the UN Global Compact. It was designed ostensibly to help the private sector better understand and address its impacts on, and management of water resources.[175] The CEO Water Mandate recognises that the business sector, through the production of goods and services, directly or indirectly impacts on water resources. Corporations endorsing the CEO Water Mandate acknowledge a responsibility to make sustainable water-resources management a major priority as part of addressing the global water challenge. As of May 2012, 85 corporations from across the world had endorsed the CEO Water Mandate. The CEO Water Mandate covers six elements: Direct Operations; Supply Chain and Watershed Management; Collective Action; Public Policy; Community Engagement; and Transparency. It seeks to build an international movement of committed companies in the sustainable management of water resources. The initiative is open to companies of all sizes and from all sectors, and from all parts of the world. The initiative requires the endorsement of a company's Chief Executive Officer, or equivalent. A company wishing to join the initiative should indicate their endorsement of the CEO Water Mandate and its six elements by submitting a letter, signed by the Chief Executive Officer. However, it is important to note that participation in the CEO Water Mandate is restricted to existing

multi-stakeholder and other soft law initiatives will be discussed below in so far as they are relevant for holding non-State actors accountable in situations where water services have been privatised. In the absence of binding international standards, voluntary mechanisms have become the principal means through which MNCs have expressed their commitment to respecting human rights.[176]

There are ongoing attempts at the UN level to identify, clarify and elaborate international standards and practices regarding business and human rights. Such initiatives are important in understanding the human rights duties and responsibilities of non-State actors involved in the provision of water services in privatisation scenarios. These include the UN Framework and Guiding Principles referred to in the preceding paragraph. The second is the current work of the Special Rapporteur on the right to water and sanitation. The CEO Water Mandate adopted under the auspices of the UN global Compact was designed to help corporations understand their impacts on water resources. These initiatives and their potential relevance for holding corporations accountable are discussed in the following section.

5 3 2 The UN Respect, Protect and Remedy Framework and Guiding Principles

This section considers the UN's most recent effort at developing a transnational regulatory framework for MNCs and other business enterprises. The framework was developed by the former Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie (hereinafter referred to as "the SRSG.")[177] The failure by the UN Commission to adopt the Norms on TNCs led to the establishment of a mandate of the SRSG to undertake a new process culminating in the appointment of John Ruggie. In its 2005 session, the UN Commission requested the UN Secretary

---

corporate endorsers of the Global Compact. Some of the largest water providers on the endorsing list include GDF Suez (France), Groupe Danone (France) and Veolia Water (France). Some of the largest water consumers are also on the list of endorsing corporations and these include The Coca-Cola Company (USA), Heineken NV (The Netherlands), Nike Inc. (USA), PepsiCo Inc. (USA), SABMiller (South Africa) and Unilever (UK).[175] There is a provision though that companies that are not currently signatories of the Global Compact may endorse the CEO Water Mandate provided they intend to join the Global Compact within six months of endorsing the CEO Water Mandate. See *Global Compact CEO Water Mandate*.

[176] Chirwa 2006 *South African Journal of Human Rights* 76.

[177] The SRSG mandate was replaced by a Working Group on Business and Human Rights. *See* UN Human Rights Council *Human Rights and Transnational Corporations and Other Business Enterprises* (2011) UN Doc A/HRC/17/L.17/Rev.1 para 6.

General to appoint a Special Representative on the issue of human rights and TNCs to proceed with the project.[178] The SRSG, who served from 2005 to 2011, responded by promulgating the UN Framework and Guiding Principles[179] The latter was officially adopted by the UN Human Rights Council in June 2011.[180]

The SRSG was mandated to identify and clarify standards of corporate responsibility and accountability for TNCs and other business enterprises with regard to human rights.[181] The SRSG was further mandated to elaborate on the role of States in effectively regulating and adjudicating the role of TNCs and other business enterprises with regard to human rights. As part of his mandate, the SRSG was charged with researching and clarifying the implications for corporations of concepts such as "complicity" and "sphere of influence."[182] The SRSG's mandate also required him to develop materials and methodologies for undertaking human rights impact assessments of the activities of TNCs and other business enterprises. He was further requested to compile a compendium of best practices of States and TNCs and other business enterprises.[183]

It is against this background that the SRSG proposed a three-pillar framework on the application of human rights standards on corporations to the UN Human Rights Council in 2008, the UN Framework.[184] The UN Framework is based on the

[178] United Nations Commission on Human Rights (2005) UN Doc E/CN.4/2005/L.87.
[179] See UN Guiding Principles. For a discussion of the Guiding Principles, see JH Knox "The Human Rights Council Endorses 'Guiding Principles' for Corporations" (2011) 15 *American Society of International Law Insight* <http://www.asil.org/pdfs/insights/insight110801.pdf> (accessed 23.05.2012); D Bilchitz "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations? 2010 (7) *International Journal on Human Rights* 199-229; S Deva "Guiding Principles on Business and Human Rights: Implications for Companies" (2012) 9 *European Company Law* 101–109; LC Backer "On the Evolution of the United Nations 'Protect-Respect- Remedy' Project: The State, the Corporation and Human Rights in a Global Governance Context" (2010) 9 *Santa Clara Journal of International Law* 101-156; Kenan Institute for Ethics *The UN Guiding Principles on Business and Human Rights Analysis and Implementation: A Report from the Kenan Institute for Ethics* (2012) < http://kenan.ethics.duke.edu/wp-content/uploads/2012/02/UN-Guiding-Principles-on-Business-and-Human-Rights-Analysis-and-Implementation.pdf> (accessed 23.04.2012); JH Knox "The Ruggie Rules: Applying Human Rights Law to Corporations (2011) <http://ssrn.com/abstract=1916664 (accessed 23.04.2012); RC Blitt "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance (2012) 1-21.
[180] See UN Human Rights Council *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011) A/HRC/17/31.
[180] See UN Human Rights Council *Protect, Respect and Remedy* para. 9.
[181] United Nations Commission on Human Rights *Human Rights and Transnational Corporations and Other Business Enterprises* Resolution 2005/69 para 1.
[182] Para 1.
[183] Para 1.
[184] See UN Human Rights Council *Protect, Respect and Remedy: A Framework for Business and Human Rights* paras 47- 49.

notion of "differentiated but complementary responsibilities."[185] It encompasses the following three principles: the State duty to protect human rights, the corporate responsibility to respect human rights, and access to remedies.[186]

The SRSG emphasised that the UN Framework required no changes to existing law, only a better understanding of it. The first prong of the UN Framework provides for the State duty to protect against human rights abuses by third parties through regulation and adjudication. The second prong of the UN Framework enjoins corporations to respect human rights under a due diligence standard intended to avoid infringing on human rights of others. Under this leg of the framework, corporations are enjoined to desist from infringing on the rights of others and to address any adverse impacts resulting from their operations. The third prong of the UN Framework seeks to enhance access for victims of human rights violations to an effective remedy, both judicial and non-judicial.[187] This part of the prong emphasises the need for more effective remedies for corporate human rights abuses. The SRSG proceeded to operationalise the framework by developing concrete and practical recommendations which he ultimately set forth in the UN Guiding Principles. After endorsing the Guiding Principles, the UN Human Rights Council proceeded to establish a working group mandated to effectively disseminate and help in the implementation of the UN Framework and Guiding Principles.[188]

5 3 2 1 State duty to protect

The State's duty to protect was discussed in chapter 4 above.[189] The UN Framework as well as the UN Guiding Principles focus on the State duty to protect.[190] The Guiding Principles provide for States to protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises.[191]

---

[185] See UN Human Rights Council *Protect, Respect and Remedy* para. 9.
[186] Para 9.
[187] UN *Guiding Principles* para 4.
[188] United Nations Human Rights Council Human Rights and Transnational Corporations and Other Business
Enterprises (2011) UN Doc A/HRC/17/L.17/Rev.1.
[189] See Chapter 4 above sections 4 2 2 1.
[190] See UN *Framework* paras 27 - 50. For further discussion on the State duty to protect, see DM Chirwa "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights" (2004) 5 *Melbourne Journal of International Law* 1 1.
[191] UN *Guiding Principles* principle 1.

States are required to take steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.[192]

The weaknesses of over-reliance on the State's duty to protect from human rights abuses by non-State actors such as corporations have been explained above.[193] Non-State actors such as MNCs tend to operate at a transnational level and have the capacity to disappear or move from one jurisdiction to another.[194] Often, some States are either unwilling or unable to act against non-State actors that violate human rights of marginalised communities. Most notably, developing countries that take a hard-line stance against human rights abuses by MNCs might impair their competitiveness to attract much-needed foreign investment.[195] The effect of such factors is to undermine the capacity of States to establish regulatory mechanisms at the municipal level.

These limitations on a State's obligation to protect against human rights violations by non-State actors notwithstanding, the SRSG's Framework over-relied on this regulatory technique. Despite the limitations of State-focused regulation, the State's duty to protect remains an important component for holding non-State actors in water privatisation scenarios. The State's protective mandate has been discussed above hence this section will primarily focus on the responsibilities of non-State actors as enunciated in the UN Framework and Guiding Principles.

5 3 2 2 Corporate responsibility to respect human rights

The second leg of the UN Framework provides for the corporate responsibility to respect human rights. The SRSG's response to any potential State incapacity to regulate corporations is to rely on the corporation's obligation to respect human rights. In the SRSG's view, the responsibility stems from societal expectations[196] rather than human rights law.[197] The corporate responsibility to respect human rights is not mediated through the primary State duty to protect. Rather, in terms of the UN Framework and Guidelines, the responsibility to respect human rights applies directly

[192] Principle 1. The CESCR has also recently affirmed the importance of ensuring access to effective remedies to victims of corporate abuses of economic, social and cultural rights, through judicial, administrative, legislative or other appropriate means. See CESCR Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, para 5.
[193] See section 5 1 2 above.
[194] S Deva "Guiding Principles on Business and Human Rights: Implications for Companies" (2012) 9 *European Company Law* 101 103.
[195] 103.
[196] See UN *Framework* paras 54 - 55 and UN *Guiding Principle* 11.
[197] See UN *Framework* para 9 and UN *Guiding Principles* para 6.

to corporations. The corporation's duty to respect human rights exists independently of States' duties.[198] It is important that the duty imposed on corporations to respect human rights exists independently of the ability or willingness of States to fulfill their own human rights obligations in relation to the duty to protect.[199] Furthermore, the responsibility to respect human rights applies to all companies regardless of size, sector, operational context, ownership and structure. The burden of responsibility however varies in proportion to the size or sector of the corporation and the severity of adverse human rights impacts caused.[200] The responsibility to respect human rights, according to this framework, requires not only that corporations avoid causing adverse impacts to human rights themselves..[201]

The UN Framework and Guiding Principles interpret the current international human rights framework as imposing few positive human rights obligations on corporations. Such positive duties include the duty to prevent and mitigate harm as well as the duty to provide reparations for abuse of human rights.[202] The SRSG did expect some level of positive obligations.[203] The SRSG utilised the example of non-discrimination policies that may require the adoption of specific recruitment and training programmes.[204] Reparations also might include compensation, restitution, guarantees of non-repetition, amendments to the relevant law and public apologies.[205]

The obligation to respect appears primarily in negative terms: the corporation should not interfere with the enjoyment of a human right. Additionally, a corporation should avoid being complicit when a State violates human rights.[206] The UN Guiding Principles, in their elaboration of the UN Framework, state that corporations must respect, at a minimum, those human rights recognised in the International Bill of Rights and the ILO's Declaration on Fundamental Principles and Rights at Work.[207] However, there is an exception to this "baseline responsibility"[208] where corporations perform public functions. It is however unclear from the SRSG's framework as to

[198] UN *Guiding Principles* para 12.
[199] See UN *Guiding Principles*, Principle 26 and Commentary.
[200] Principle 11 and Commentary.
[201] Principle 13.
[202] See UN *Framework* pars 24, 55, 73, 93-95.
[203] Para 55.
[204] Para 55.
[205] Para 83.
[206] Paras 24, 54, 73.
[207] UN *Guiding Principle* 12.
[208] Para 54.

what is meant by public functions. Deva, for instance, points that a corporation managing a detention centre or a hospital might arguably be performing public functions. A corporation supplying water services could be regarded as performing a public function.[209]

An integral part of implementing the responsibility to respect human rights is the requirement that corporations should conduct human rights due diligence. At the heart of human rights due diligence lies the principle that an investigative process must be undertaken to assess actual and potential human rights risks that may be associated with a corporation's operations and relationships for the purpose of preventing harm.[210] Due diligence requires a corporation to make itself aware of, and prevent any negative human rights impacts resulting from its operations.[211] The UN Framework's due diligence process enjoins corporations to adopt a human rights policy, integrate it throughout the company, and conduct human rights due diligence throughout its operations.[212] The UN Framework further provides that corporations should undertake human rights impact assessments before initiating new projects as well as monitoring and auditing ongoing projects.[213] Corporations are further enjoined to track the effectiveness of their responses to any impacts, and publicly communicate their responses.[214]

It is also noteworthy that contrary to the approach adopted by the Norms on TNCs, the UN Framework rejects the concept of a "sphere of influence" as a fixed sphere.[215] According to the UN Framework, a corporation's responsibility is not a fixed sphere nor is it based on influence. Rather, a corporation's sphere of influence depends on actual human rights impacts resulting from a company's business activities and the relationships connected to such activities.[216] Although the SRSG noted that it may be appropriate to ask corporations to support human rights voluntarily where they have influence, attributing legal responsibility to them on that basis alone is inappropriate.[217]

---

[209] Deva 2012 *European Company Law* 103
[210] See UN *Guiding Principles* para 17.
[211] See UN *Framework* para 56.
[212] Para 54-63.
[213] Para 63, and generally, paras 54 - 63.
[214] UN *Guiding Principles* 17- 21.
[215] UN *Framework* para 72
[216] Para 72.
[217] Para 69.

5 3 2 3 Criticism of Ruggie's conception of the corporate duty to respect human rights

There are a number of problems with the second leg of the UN Framework and Guidelines as espoused by the SRSG. Such limitations may dilute the efficacy of the initiatives in elaborating the responsibilities of corporations in situations of water privatisation. The UN Framework and Guiding Principles do not offer any sound normative basis for why non-State actors such as corporations should have human rights responsibilities. The only justification that one could decipher from the UN Framework and the Guiding Principles is that corporations should have a responsibility to respect human rights because "it is the basic expectation society has of business."[218] Furthermore, the SRSG's use of the term "responsibility" to respect rather than the "obligation" to respect human rights appears to suggest that human rights responsibilities of corporations do not generate any legal consequences.[219]

The UN Guiding Principles define human rights to mean, at a minimum, all internationally recognised human rights. These are explained as the rights enumerated in the UDHR, the ICCPR, the ICESCR and the principles concerning fundamental rights in the eight ILO core conventions set out in the Declaration on Fundamental Principles and Rights at Work.[220] However, the Commentary to the UN Guiding Principles indicates that corporations might need to look beyond this minimalist human rights approach. They are expected to consider other international human rights instruments related to groups of people for example women, children, people with disability, and indigenous people.[221] The UN Framework also does not catalogue the human rights duties that corporations must adhere to. It does not define obligations for corporations in respect of specific human rights, but rather

---

[218] See UN *Framework* para 9 & UN *Guiding Principles* para 6.

[219] See UN *Framework* para 54 which states: "Failure to meet this responsibility can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts." See also UN *Guiding Principles*, Commentary on Principle 12.

[220] See UN *Guiding Principles* 12 and Commentary. The commentary to principle 12 states:

> [E]nterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.

[221] UN *Guiding Principles*, Commentary on Principle 12.

gives a general perspective on how corporations should function in relation to human rights.[222]

This circular approach of cataloguing human rights responsibilities of corporations creates particular challenges. Corporations are expected to surf through many State-focused human rights instruments to ascertain their own human rights responsibilities.[223] Deva has also argued that the minimalist definition of "internationally recognised human rights" does not offer concrete guidance to companies in ascertaining their human rights responsibilities.

The UN Framework and Guidelines in this respect are in line with States' desire to maintain the traditional form of international law in which they remain the principal duty-bearers in respect of human rights. The UN Framework and its Guiding Principles provide very little to assist those States that, due to their precarious political or economic situation, are in a weak position to regulate corporations effectively. The Guiding Principles appear to assume the ideal of a stable State, able to exercise its responsibilities to protect and remedy. They make no effort at addressing the complex questions inherent in situations where States are either unwilling or unable to enforce corporate behaviour which infringes human rights. Rather, the Guiding Principles adopt an easier path of referring companies to international instruments that were drafted with States as the duty bearers. Such an approach of transplanting human rights obligations meant for States onto corporations might create some conceptual problems.[224] Deva gives the example of article 12 of the ICESCR which provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Deva asks whether such a right can be translated into responsibilities for corporations. Lack of clarification may mean that corporations would struggle to distil the nature of the duties imposed on them by the human rights instruments.[225]

The other weakness of the system is in the human rights due diligence approach as provided in the UN Framework and the Guiding Principles. Although the UN Framework and Guiding Principles provide for corporations to adopt due diligence mechanisms, the actual process for developing, implementing, and monitoring assessment rests on the corporations. Such an approach may not be

[222] See UN *Guiding Principles* paras 11 - 15.
[223] Deva 2012 *European Company Law* 103.
[224] 103
[225] 103.

problematic in States with a functional judiciary and other regulatory mechanisms in place to address negative human rights impacts by corporations. The primary challenge exists in those States with a dysfunctional judicial system. Victims of human rights violations by corporations may be left with the weak self-assessment system of corporations as the principal means of human rights protection under the UN Framework and Guiding Principles.

5 3 2 4 Duty to remedy

The third leg of the UN Framework which provides for access to remedies is quite critical because rights may not mean much in the absence of effective remedies for their enforcement.[226] Both businesses and States are responsible for ensuring an adequate remedy when abuses occur.[227] States must take judicial, administrative, legislative or other appropriate steps to ensure that victims of such violations have access to effective remedies as part of their duty to protect against human rights violations by corporations.[228] The commentary to the UN Guiding Principles explains that potential remedies may range from apology to restitution, rehabilitation, compensation, injunction and punitive sanctions.[229] States should facilitate access to effective business administered industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards.[230]

States are obliged to establish or strengthen effective judicial as well as non-judicial mechanisms to address corporate human rights abuses.[231] The UN Guiding Principles set out criteria that such mechanisms should meet to be legitimate. They must be accessible, predictable, equitable, and transparent.[232] In this regard, States should take steps to overcome legal, practical or procedural barriers that could impede access to effective remedies. Such barriers could be in the form of such concepts as *forum non conveniens*, corporations' misuse of the principle of separate legal personality, lack of legal representation and non-availability of class actions in civil suits.[233]

---

[226] Deva 2012 *European Company Law* 104.
[227] See UN *Framework* paras 26, 82-99.
[228] See UN *Guiding Principle* 25.
[229] See UN *Guiding Principles, Commentary on Principle* 25.
[230] Principles 28.
[231] Principles 26 and 27.
[232] Principle 31.
[233] See UN *Guiding Principle 26 and Commentary*.

The UN Framework's provision for multiple implementation mechanisms and strategies that ought to be employed to make MNCs accountable for human rights abuses is laudable.[234] The major weakness of this leg of the framework is that the UN Framework makes it clear that the right to a remedy is a duty enforceable against the State, and not the corporation.[235] Relying on the State to ensure access to victims of human rights abuse by a corporation without creating corresponding duties on the latter may be problematic. The same accountability problems arise where the State is unable or unwilling to protect those within its jurisdiction from the human rights impairing activities of a corporation.

5 3 2 5 Corporation level grievance procedure

The UN Framework and Guiding Principles also enjoin corporations to establish or participate in effective operational-level grievance mechanisms for individuals and communities whose human rights may be adversely impacted by their operations.[236] This operational-level grievance mechanism is normally administered by the corporation. Such corporation-initiated operational-level grievance mechanisms should be accessible directly to individuals and communities adversely impacted by the human rights-infringing activities of the corporation.[237]

The UN Guiding Principles provide for the criteria that operational level grievance mechanisms must comply with in order to be credible. The operational level grievance procedure must be legitimate and thus evoke trust from the stakeholder groups for whose use it is intended, and should provide for a fair conduct of grievance processes.[238] The grievance procedure must be accessible to all individuals and groups for whose use it is intended, and should render adequate assistance to those who may face particular barriers to access.[239] The grievance procedure must also be predictable thus providing a clear and known procedure. In particular, it must indicate a timeframe for each stage, clarity on the types of process and potential outcomes available, as well as a means of implementing the outcome.[240] The grievance procedure must also be equitable and should seek to

[234] Deva 2012 *European Company Law* 103.
[235] See UN *Guiding Principle 25.*
[236] See UN *Guiding Principle* 29.
[237] See UN *Guiding Principles, Commentary to Guiding Principle* 29.
[238] See UN *Guiding Principle* 31 (a).
[239] Principle 31 (b).
[240] Principle 31 (c).

ensure that aggrieved parties have reasonable access to sources of information and advice. It must also provide for the expertise necessary to engage in a grievance process on fair, informed and respectful terms.[241] The UN Guiding Principles further provide that the grievance procedure must be transparent, ensuring that the parties to a grievance are kept informed about progress in processing the complaint.[242] Finally, the corporation must ensure that the operational level grievance procedure is rights-compatible: in other words the outcomes and remedies must accord with internationally recognised human rights.[243]

The UN Framework and Guiding Principles are the first corporate human rights responsibility initiative ever to be approved by the UN which seeks to elaborate the human rights responsibilities of MNCs. This initiative attempts to chart a consensual, albeit minimalist approach, towards defining and enforcing human rights responsibilities for corporations.[244] However, the UN Framework and the Guiding Principles should not be treated as the final pronouncement on this subject. Rather this initiative should be regarded as an important step in holding non-State actors such as corporations accountable for their activities that impinge on human rights. The UN Framework and Guiding Principles provide significant guidance to non-State actors such as corporations, States, individuals and communities who may be at the receiving side of human rights infringing activities from corporations.[245] The adoption of the UN Framework and Guiding Principles signify an emerging global consensus that “business as usual” is not acceptable and that corporations have human rights responsibilities, including the right to respect and protect water and related services.[246] This initiative is important in elaborating the responsibilities of corporations in water privatisation situations as will be clear below where I demonstrate the significance of the initiative in relation to water privatisation scenarios.

5 3 3 Non-State actor responsibility to respect the right to water

It was observed above that in its traditional sense, the obligation to respect entails a duty to refrain from acts or omissions whose effect is to interfere or deprive

[241] Principle 31 (e).
[242] Principle 31 (f).
[243] Principle 31 (f).
[244] Deva *European Company Law* 108.d
[245] 108.
[246] 108.

individuals or groups' enjoyment of their right to water.[247] As pointed above, the obligation to respect is broad enough to proscribe the adoption of policies that result in denial of access by poor communities to the right, rather than simply prohibiting interference with existing access to water services.[248] Categorising a case in terms of the duty to respect, protect, promote and fulfill rights should not be determinative of the interpretative approach to the rights in issue.[249] International human rights law imposes a combination of negative and positive duties for the effective protection and guarantee of all human rights, including the right to water.[250] At a minimum, corporations involved in supplying water on behalf of organs of the State should be required to ensure that the quality of the water is safe so as to ensure protection of people's health, and to meet their basic water needs in relation to personal and domestic use. This is especially important for marginalised members of society.[251]

The UN Framework and Guiding Principles discussed above provide authoritative elaboration on the meaning of non-State actor's responsibility to respect the right to water.[252] Non-State actors have a responsibility to respect the right to water. In order to ensure that this obligation is complied with corporations will need to take certain positive steps, for example human rights impact assessments and other aspects of due diligence..[253] The Norms on TNCs recognise the responsibility of corporations to respect the right to water, amongst other duties, stating that:

> "Within their respective spheres of activity and influence transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law."[254]

---

[247] See chapter 4 section 4 2 1 above.
[248] See chapter 4 section 4 2 1 above.
[249] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 87.
[250] 83.
[251] M Williams "Privatisation and the Human Right to Water: Challenges for the New Century" 2006-2007 (28) *Michigan Journal of International Law* 467 490.
[252] See UN *Guiding Principle* 11.
[253] The duty to respect has traditionally been aligned only with negative duties but jurisprudence from South Africa in eviction cases has emphasised the positive dimensions of this duty. For example the right to respect access to housing guaranteed under the South African constitution has been interpreted as entailing as a duty not to evict people from housing unjustifiably and if they do to (a) engage meaningfully with them; and (b) provide alternative accommodation. See *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) paras 15-18 and para 46.
[254]UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2 para 1. For an in-depth

The corporate responsibility to respect the right to water has two significant but related aspects. Firstly, non-State actors have a duty to avoid causing or contributing to adverse human rights impacts through their own activities that impair the right to water.[255] Secondly, non-State actors should seek to prevent or mitigate adverse impacts linked to their operations that infringe on the right to water.[256]

The OECD Guidelines explicitly provide that MNCs should respect the international human rights obligations of the countries in which they operate.[257] These include the domestic human rights obligations of the host State.[258] It is significant to note that whereas the text of the OECD Guidelines employs the verb "should," the Commentary to the OECD Guidelines suggests that corporations have an obligation to respect human rights. The Commentary to the OECD Guidelines explains that respect for human rights is the global standard of expected conduct for corporations.[259] The OECD Guidelines further provide that the obligation to respect imposed on MNCs enjoins them to desist from infringing on the human rights of others through their activities. Furthermore, corporations are obliged to address adverse human rights impacts resulting from their activities.[260]

The UN Framework also emphasises that non-State actors should observe internationally recognised human rights even where national law is weak, non-existent or not enforced. Non-State actors involved in the provision of water services are enjoined to give particular attention to water use in contexts of extreme poverty. They should also be conscious of how conflicts or humanitarian emergencies might impact on the right to water as part of their responsibility to respect the right to water.[261] The right to water thus remains an important right even in situations where the national government is oppressive, national laws are not enforced, or local authorities are unwilling or unable to observe national law.[262] In this sense,

---

analysis of the Norms, see Chirwa 2006 22 *South African Journal of Human Rights* 77 and Bilchitz *The South African Law Journal* 765.

[255] United Nations *Guiding Principles on Business* principle 13 (a).

[256] Principle 13 (b).

[257] OECD Guidelines *Human Rights* para 37.

[258] Para 37.

[259] See Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises para 37.

[260] OECD Guidelines *Human Rights* para 2.

[261] Institute for Human Rights *Water Business and Human Rights* (2011) 28 <http://www.ihrb.org/pdf (accessed 05.02.2012).

[262] Institute of Human Rights *Water: Business and Human Rights* 28.

corporations cannot simply wait for regulation. Rather, they have a positive role to play in pressing for standards to be respected.[263]

Non-State management of water services often raises the concern that such entities might limit or impede the right of access to water. Any regulatory approach that is consistent with the human right to water should ensure that the provider does not over-emphasise full-cost recovery and other commercial objectives at the expense of other social objectives. Particularly important in privatisation scenarios are issues concerning disconnections and tariffs.

5 3 3 1 Human rights due diligence in respect of the right to water

Human rights due diligence or impact assessments are a relatively new tool in the toolbox of human rights practitioners. Human rights impact assessment entails a systematic process to investigate and measure the impact of policies, programmes, projects, and interventions on human rights.[264] There is a growing realisation, even in the corporate community, of the need to integrate human rights in corporate policies and practices.[265]

The Norms on TNCs further provide for an obligation on corporations to undertake periodic human rights impact assessments of their operations and activities.[266] The commentary to the Norms on TNCs explains that a corporation must study the human rights impacts of any intended project before it embarks on such project.[267] It is significant to note that impact assessments are quite an established procedure under environmental law. Human rights impact assessments by non-State actors before and during the life of a project may serve a useful purpose in forestalling actual and potential human rights violations by non-State actors.[268]

The private provider of water services should undertake a human rights due-diligence process as part of its responsibility to respect the right to water. The private water provider should take steps to become aware of, prevent and address adverse

---

[263] 28.
[264] S Bakker *et al* "Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)" (2009) 1 *Journal of Human Rights Practice* 436 436.
[265] 436.
[266] See Para 16 of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2. For an in-depth analysis of the Norms, see Chirwa 2006 22 *South African Journal of Human Rights* 77 and Bilchitz *The South African Law Journal* 765.
[267] Commentary to the Norms para 16(1).
[268] Chirwa 2006 *South African Journal of Human Rights* 96.

human rights impacts as part of its human rights due diligence.[269] This process should enable the corporation to identify, prevent, mitigate and account for any impacts on the right to water as a result of its operations.[270]

A number of tools have been developed to examine a range of activities from a human rights perspective. These include the impact of development programmes of foreign governments on beneficiary countries, the impact of government policy and legislation on domestic protection of human rights, and the impact of MNCs on human rights.[271] Some of the key examples are the human rights impacts assessments models by *Rights and Democracy*, the IFC's, jointly developed in association with the *International Business Leaders Forum* and the UN Global Compact, and the Health Rights of Women Assessment Instrument developed by *Aim for Human Rights*.[272] *Rights and Democracy* has undertaken various studies on human rights impact assessments. The studies focused on water privatisation in Argentina, mining operations in The Philippines, Peru and the Democratic Republic of Congo as well as the use of information technology in China.[273] Such a model

---

[269] UN Human Rights Council *Framework* para 56. Bakker *et al* have explained that:

> HRIA tools assist documentation and contextual description and monitor to what extent States or other actors comply with human rights treaties. They can be used for mapping human rights violations or serve as advocacy tools by assisting in the formulation of concrete, rights-based recommendations for change in policy. Impact assessments can be carried out before an activity takes place (*ex ante*) or after an activity has taken place (*ex post*). *Ex ante* HRIAs aim to measure the potential impact of activities on human rights. The objective here is to prevent human rights violations and/or to maximize potential positive effects. It is important to carry out *ex ante* HRIAs at the earliest stage possible in order for the outcome to be incorporated into the decision-making process HRIAs on the other hand, aim to measure the actual impact of activities on human rights and therefore can take place after an activity. The forward looking aspects of impact assessments can enhance policy development and prepare arguments for policy choices. The backward looking aspects facilitate measuring whether the applied policy did achieve the objectives, as well as looking at the process itself – asking 'whether we have done what we agreed to do?' Bakker *et al* 2009 *Journal of Human Rights Practice* 436-437.

[270] See UN Human Rights Council *Guiding Principles on Business* principle 15.

[271] Bakker *et al* 2009 *Journal of Human Rights Practice* 437.

[272] For various models of human rights impacts assessments see <http://www.humanrightsimpact.org> (accessed 27.06.2012).

[273] See Rights and Democracy: Human Rights Impact Assessments for Foreign Investment Projects: *Learning from Experiences in The Philippines, Tibet, the Democratic Republic of Congo, Argentina and Peru* (2007) http://www.dd-rd.ca/site/_PDF/publications/globalization/hria/2007.pdf (accessed 02.07.2012). A range of other toolkits have been produced to enhance accountability of MNCs in undertaking projects in developing countries. Some of them include the Conflict Sensitive Business Practice: Guidance for Extractive Industries by International Alert. This tool that has been developed for extractive industries operating in conflict regions and includes assessment of human rights impacts alongside a number of other issues like corruption, transparency and social investment. See International Alert *Conflict Sensitive Business Practice: Guidance for Extractive Industries* (2005) <http://www.international-alert.org/pdfs/conflict_sensitive_business_practice_all.pdf> (accessed 26.06.2012). An organisation called Nomogaia has developed a methodology for conducting human rights impact assessments to examine the implications of capital projects in developing countries that could directly harm or improve the status of human rights provided in human rights instruments. See

provides a useful template in conducting human rights impact assessments before and during the management and provision of water services by a private provider. Such an approach will help to maximise any positive impacts that non-State involvement in the water sector can have for the realisation of the right to water. It helps corporations involved in the water sector to avoid impairing or contributing to adverse human rights impacts and address such impacts when they occur.

The UN Special Rapporteur explained that the provision of water services is characterised by special features in that the service relates directly to the fulfilment of human rights.[274] Corporations are enjoined to observe particular requirements in exercising due diligence as part of their duty to respect the right to water.[275] The Special Rapporteur has clarified that in order to be able to respect the right to water, non-State actors need to know the actual and potential impacts on access to water.[276] It must be noted that such due diligence entails a comprehensive, proactive attempt to uncover risks, actual and potential towards the realisation of the right to water. The assessment should be explicitly based on human rights, including the right to water and should specifically address the human rights impact on the most excluded and marginalised groups. Such risk assessment should be ongoing, recognising that the human rights risks to the right to water may change over time as the corporation's context and operating context evolve.[277] The responsibility to carry out human rights due diligence to respect the right to water may also require corporations to take some positive steps. Such steps involve putting into place the necessary policies, mechanisms to identify actual and potential harm to human right to water and the provision of grievance mechanisms.[278]

In exercising due diligence, non-State service providers are expected to consider the country and local context in which they carry their activities such as the institutional capacities of the State in order to identify specific human rights challenges.[279] Furthermore, the non-State provider of water services must also

---

Nomogaia *A Methodology for Human Rights Impact Assessment* (2008). <http://www.nomogaia.org/> (accessed 26.06.2012).

[274] *Special Rapporteur Report* para 10.

[275] Para 10.

[276] Para 26.

[277] See UN Human Rights Council *Guiding Principles on Business* principle 17(c).

[278] *Special Rapporteur Report* para 26.

[279] Para 27.

consider whether it might contribute to abuse of the human right to water through its relationships with other actors.[280]

Where a non-State actor is involved in the provision of water services, service delivery should also be assessed against the standard of the human right to water.[281] This means that, despite the involvement of a private service, water must be available in a quantity sufficient to satisfy all personal and domestic needs.[282] Significantly, water must be safe so as not to pose a threat to human health and should comply with the World Health Organisation Guidelines for Drinking Water Quality.[283] It is important that the non-State actor provider ensure that the water supply is sufficiently reliable to allow for the collection of sufficient amounts for personal and domestic needs over the entire day.[284] The non-State actor should also ensure that the water is available within or in the immediate vicinity of the household, healthcare facility, school or public place.[285]

Although water does not necessarily have to be provided for free, the non-State actor provider should meet human rights standards laid down by the right to water. The tariffs and connection costs must be designed in such a way that makes them accessible to all sections of the community, including the marginalised individuals and groups living in extreme poverty. This necessarily means that despite non-State actor involvement, individuals must have access to "minimum essential levels of water" despite their inability to pay.[286]

Developing States might lack the necessary expertise in drafting or understanding water privatisation agreements. Providing essential services to groups of people who are poor and marginalised, ensuring that water services are affordable and avoiding water disconnections when users are unable to pay are some of the challenges likely to be encountered in water privatisation agreements. It is important to ensure the quality of water services and the presence of a sound regulatory capacity for enforcement. Monitoring of performance and the establishment of effective complaint mechanisms are important human rights issues in any water

[280] Para 27.
[281] See section 2 6, chapter 2 on the normative content of the right to water.
[282] *Special Rapporteur Report* para 47(a).
[283] Para 47(b).
[284] Para 47(b).
[285] Para 47(f).
[286] Para 48.

privatisation arrangement.[287] These concerns should be addressed by States and corporations when they negotiate the terms of privatised delivery of water services, agree on contracts, and implement them. Specifically, a service provider should expect to engage with State authorities on these issues to ensure its own conduct or practices do not contribute to abuses of the human right to water.[288]

5 3 3 2 Non-State actor responsibility to provide for grievance mechanisms

The importance of grievance and enforcement mechanisms as part of realising the right to water cannot be over-emphasised. The provision of effective grievance mechanisms constitutes a significant component of the UN Framework and Guidelines discussed above. Such mechanisms are important where water services have been privatised to ensure the accountability of the private service provider. Grievance mechanisms and access to effective remedies with respect to the right to water are essential. Such grievance mechanisms provide a framework for holding water service providers accountable for any deteriorating services, unmet performance standards, and unjustified tariff increases.[289] A non-State service provider has a responsibility to put in place mechanisms that allow individuals and groups to bring alleged human rights abuses of the right to water to the attention of the service provider.[290]

The allocation of oversight roles should avoid any conflicts of interest, for instance, between ensuring the effectiveness of the grievance mechanism on the one hand and defending the actions or decisions of certain parts of the corporation on the other. For such grievance mechanisms to be legitimate, they should be easily accessible to individuals and groups affected by the non-State actor's operations.[291] The provision of grievance mechanisms is an integral part of exercising human rights due diligence. Such mechanisms enable the non-State actor involved in the provision of water services to become aware of its acts or omissions that impact negatively on the realisation of the human right to water.[292] Where the non-State provider identifies

[287] Para 30.
[288] Para 17.
[289] Para 56.
[290] Para 58.
[291] Para 58.
[292] Para 58.

any abuse of the right to water as a result of its acts or omissions, it is expected to provide remediation through legitimate processes.[293]

The OECD Guidelines also provide for MNCs to provide an effective remedy for any adverse human rights impacts caused by corporations. The OECD Guidelines provide that MNCs must ensure effective measures to address human rights impacts arising from their activities.[294] The Commentary to the OECD Guidelines elaborates that MNCs must have processes in place to enable remediation in cooperation with judicial or State-based non-judicial mechanisms.[295] Apart from such State-based non-judicial mechanisms, MNCs are expected to provide for operational-level grievance mechanisms for those potentially impacted by a corporation's activities. To be legitimate, such internal grievance mechanisms must be accessible, predictable, equitable and compatible with the OECD Guidelines and provide for transparent procedures.[296]

UN Guiding Principles 25-31 set out principles that should underpin judicial and non-judicial mechanisms that provide remedies for abuses involving corporations. Such principles are directly relevant to companies whose activities have a bearing on individuals or communities' access to water services. In the context of water privatisation, the private water operator must establish a grievance mechanism to receive and facilitate resolution of the individuals and communities' concerns and grievances about the corporation's activities on their right to water. Mechanisms such as the IFC's *Performance Standards on Environment and Social Sustainability* and the[297] Specific Instance procedure under the OECD Guidelines for MNCs provide useful templates that can be transplanted into water privatisation scenarios to hold non-State actors accountable for infringing on the right to water.

It is important that any corporate grievance mechanism must be designed so as to address any risks and adverse impacts on the communities' right to water and other related rights.[298] The grievance mechanism should seek to resolve concerns promptly, using an understandable and transparent consultative process that is

---

[293] See UN Human Rights Council *Guiding Principles on Business* principle 22. A number of other Guiding Principles, for example Principles 24-31 are directly relevant to provision of remedies. See also *Special Rapporteur Report* para 58.
[294] OECD Guidelines *Human Rights* para 6.
[295] Para 6.
[296] OECD Guidelines *Commentary on Human Rights* para 46.
[297] IFC *Performance Standards on Environmental and Social Sustainability: Performance Standard 1*(2012) para 35
[298] Para 35.

culturally appropriate and readily accessible, and at no cost.[299] It is important that the grievance mechanism should ensure that there is no retribution to any individual or community that files a complaint.[300]

5 3 3 3 Effectiveness criteria for non-judicial grievance mechanisms

An effective grievance mechanism should help in the early identification of problems, early and agreed solutions, increased trust, and the avoidance of public protest, litigation or other forms of opposition to the water privatisation project.[301] On the other hand, a poorly designed or administered grievance mechanism may distort assessments of how well human rights risks impacting on the right to water are being managed thereby compounding affected individuals and communities' sense of grievance.[302]

The non-judicial mechanisms provided for by the non-State provider should be effective and credible so as to enable trust from all stakeholder groups for whose use they are intended. The grievance mechanisms should be accessible to all stakeholder groups and should provide adequate assistance for those who may face particular barriers to access them. The mechanisms must also be predictable and should provide clear and known procedures, clarity on the types of process and outcome available and means of monitoring implementation. The procedures for grievance remediation must also be equitable and should ensure that aggrieved parties have reasonable access to sources of information and advice necessary to engage in a fair grievance process. It is also important that the procedures must be rights-compatible by ensuring that outcomes and remedies accord with the right to water and related human rights.[303]

The internal mechanisms should augment but not compete with or undermine State-based judicial and non-judicial mechanisms. Non-State service providers must therefore not obstruct individuals and groups from accessing State-based accountability mechanisms such as court proceedings.[304] State-based adjudicative mechanisms are particularly important in the absence of an amicable resolution

[299] Para 35.
[300] Para 35.
[301] United Nations High Commissioner for Human Rights *The Corporate Responsibility* 74.
[302] 74.
[303] See para 58. See also UN Human Rights Council *Guiding Principles on Business* principle 31 (a)-(h).
[304] See *Special Rapporteur report* para 59.

between the rights beneficiaries and the water service provider. State-based mechanisms and other alternatives include courts, the State ombudsman or complaints offices specific to an industry, a labour standards office, a National Contact Point,[305] a national human rights institution, or any other State-administered or statutory body empowered to take such a role.[306] Other alternative grievance mechanisms may also include local and traditional mechanisms used by indigenous or other communities. In some cases, a mechanism administered by a multi-stakeholder initiative might have a role in resolving the grievance.[307]

The private operator should, in appropriate circumstances, seek expert advice on the extent to which such mechanisms in their local operating environment are likely to be able to remedy the grievance.[308] Any grievance procedure must be credible in the eyes of the complainant. The grievance procedure should be free of corruption or manipulation for its outcomes to be human rights compliant.[309] The section below discusses a promising grievance mechanism for holding corporations accountable for human rights abuses, including the right to water.

5 3 4 UN Global Compact Chief Executive Officer Water Mandate

The CEO Water Mandate is a corporate-driven initiative housed within the UN Global Compact. It was designed to help the private sector better understand and address its impacts on, and management of water resources.[310] The CEO Water Mandate was launched in 2007 by the UN Secretary-General and a number of international business leaders. The CEO Water Mandate recognises that the business sector, through the production of goods and services, directly or indirectly impacts on water resources.[311] Corporations endorsing the CEO Water Mandate acknowledge a responsibility to make sustainable water-resources management a major priority as part of addressing the global water challenge. As of May 2012, eight-five corporations from across the world had endorsed the CEO Water Mandate.[312]

---

[305] Available in member States to the OECD or those that have adhered to the OECD Guidelines.
[306] United Nations High Commissioner for Human Rights *The Corporate Responsibility* para 66.
[307] Para 66.
[308] Para 66.
[309] Para 66.
[310] See Pacific Institute *Corporate Water Accounting: An Analysis of Methods and Tools for Measuring Water Use and Its Impacts* (2010) 3.
[311] See CEO Water Mandate <http://www.unglobalcompact.org/issues/Environment/CEO> (accessed 13.05.2012).
[312] See *Global Compact CEO Water Mandate*.

The CEO Water Mandate seeks to build an international movement of committed companies in the sustainable management of water resources. The initiative is open to companies of all sizes and from all sectors, and from all parts of the world. The initiative requires the endorsement of a company's Chief Executive Officer, or equivalent.[313] A company wishing to join the initiative should indicate its endorsement of the CEO Water Mandate and the six elements by submitting a letter signed by its Chief Executive Officer or equivalent.[314] It is however important to note that participation in the CEO Water Mandate is restricted to existing corporate endorsers of the UN Global Compact.[315] Some of the largest water providers on the endorsing list include GDF Suez (France), Groupe Danone (France) and Veolia Water (France). Some of the largest water consumers are also on the list of endorsing corporations, including the Coca-Cola Company (USA), Heineken NV (The Netherlands), Nike Inc. (USA), PepsiCo Inc. (USA), SABMiller (South Africa) and Unilever (UK).[316] The mandate contains a provision to the effect that corporations not currently signatories of the UN Global Compact may endorse the CEO Water Mandate provided they intend to join the UN Global Compact within six months of endorsing the CEO Water Mandate.[317]

5 3 5 Implementation of the Global Compact CEO-Water mandate

Endorsing companies are required to report annually on progress in implementing the CEO Water Mandate's six elements. This provision was introduced through the Transparency Disclosure Policy for the CEO Water Mandate (hereinafter referred to as the "Transparency Policy") established by the UN Global Compact office in 2008. The CEO Water Mandate endorsers are required to publish an annual report to their stakeholders about progress in implementing the CEO Water Mandate's six elements.[318] According to the Transparency Policy, communication on progress is an important demonstration of a participant's commitment to the initiative and its

[313] See *Global Compact CEO Water Mandate*.
[314] See *Global Compact CEO Water Mandate*.
[315] See *Global Compact CEO Water Mandate*.
[316] See *CEO Water Mandate List of Endorsing Companies* <http://ceowatermandate.org/> (accessed 28.06.2012).
[317] See *Global Compact CEO Water Mandate*.
[318] The companies endorsing the CEO Global Compact Water Mandate are required to report annually on progress in implementing the CEO Water Mandate's six elements The See Global Compact CEO Water Mandate Transparency Policy 1 <http://ceowatermandate.org/files/> (accessed 13.05.2012).

objectives.[319] While there is no specific format for the implementation report, the CEO Water Mandate Transparency Report provides that the report must encapsulate the following basic elements.[320]

Firstly, the implementation report must contain an explicit statement of the corporation's continued support for the CEO Water Mandate. This is considered to renew a corporation's commitment to the initiative and its six elements.[321] Secondly, the report must contain a description of policies and practical actions that the corporate endorser has adopted to implement the CEO Water Mandate elements.[322] At the very minimum, the endorsing corporation is expected to explicitly address past or planned activities for all of the CEO Water Mandate elements.[323] In this regard, it is expected that within five years of the initial endorsement, the endorsing corporation must address concrete activities and policies that reflect implementation of all six of the CEO Water Mandate elements. Thirdly, the implementation report must contain a measurement of outcomes or expected future outcomes using broadly accepted water-related indicators.[324] Failure by an endorsing corporation to prepare a publicly available implementation report results in the change of status (to "non-communicating.")[325] Such a change of status is a precursor to the eventual delisting of an endorser from the CEO Water Mandate.

The CEO Water Mandate is the only recognisable global corporate voluntary initiative explicitly relating to water. However, there are aspects of the initiative that needs to be improved for it to be effective as a mechanism for imposing human rights responsibilities on corporations involved in the provision of water services. Although the initiative was elaborated under the aegis of the UN Global Compact, it remains a non-legally binding corporate-driven initiative. The six core elements make no reference to the duties imposed by the right to water which are binding on endorsing corporations. It is important that respect for the right to water is explicitly incorporated in the CEO Water Mandate as one of the initiative's core principles. The reporting mechanism provided for under the Transparency Policy does not provide for independent monitoring in respect of the CEO Water Mandate's six core elements by

[319] Global Compact *CEO Water Mandate Transparency Policy* 1.
[320] Global Compact *CEO Water Mandate Transparency Policy* 2.
[321] 2.
[322] 2.
[323] 2.
[324] 2.
[325] 2.

the endorsing firms. Furthermore, there is no provision for any complaints mechanism for individuals or groups whose right to water may be infringed by an endorsing corporation. The CEO Water Mandate might be strengthened by requiring endorsing corporations to establish or participate in effective operational or industry level grievance mechanisms for individuals and communities whose right to water and other related rights have been adversely impacted by their operations.

5 3 6 Study by the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation

The mandate of the Independent Expert on the human right to safe drinking water and sanitation was initially established by the UN Human Rights Council in March 2008.[326] The UN Human Rights Council, in March 2011 extended and changed its title to Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation ("hereinafter referred to as Special Rapporteur.")[327] The Special Rapporteur's overall mandate entails undertaking a study to clarify the content of the human rights obligations, including non-discrimination, in relation to access to safe drinking water and sanitation. The Special Rapporteur's mandate includes studying the normative content of human rights obligations in relation to access to water and sanitation. The Special Rapporteur is further mandated to study the responsibilities of the private sector in the context of the provision of safe drinking water and sanitation among others.[328] In 2010, the Special Rapporteur prepared a report on private sector participation in the provision of water and sanitation services.[329] In the report, she focuses on the human rights obligations and responsibilities which apply in cases of non-State service provision of water and sanitation. The Special Rapporteur specifically stated that she considered her work as building upon the UN Framework as well as operationalising it by specifically applying it to the provision of water

[326] United Nations Human Rights Council Human Rights and Access to Safe Drinking Water and Sanitation. *Resolution* 7/22 (2008). See paras 2(a)-(f) for an over view of the Special Rapporteur's mandate. Catarina de Albuquerque took up the mandate in November 2008 and her mandate enjoins her to carry out thematic research, undertake country missions, collect good practices, and work with development practitioners on the implementation of the rights to water and sanitation.

[327] United Nations Human Rights Council *The Human Right to Safe Drinking Water and Sanitation* (2011) A/HRC/RES/16/2.

[328] For a detailed overview of the five elements constituting the Special Rapporteur's on water's mandate, see <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Overview.aspx> (accessed 07.05.2012).

[329] United Nations Human Rights Council Report of the Independent Expert on the issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation (2010) A/HRC/15/31 (referred to as the "Special Rapporteur Report.")

services.[330] The Special Rapporter also proposed a conceptual difference between the human rights obligations of States and the responsibilities of non-State service providers.[331]

In the same vein as the UN Framework, the Special Rapporteur proposed that parallel to the obligation of the State to protect, the non-State service provider must, as a general obligation, comply with the laws and regulations of the State.[332] The Special Rapporteur relies on the UN Framework to underscore the need for non-State actors involved in the provision of water services to carry out a human rights impact assessment of their activities in order to be able to effectively respect human rights.[333] Additionally, the Special Rapporteur emphasised the importance of providing grievance mechanisms to address any water-related disputes. The non-State actor should provide internal grievance mechanisms to address the water-related rights of individuals and communities that may be negatively impacted by the water services provider.[334]

The above are some of the important principles related to the human rights responsibilities of corporations in relation to the right to water elaborated in the Special Rapporteur's study. The importance of the principles enunciated in the Special Rapporteur's study and related initiatives will be discussed below in so far as they are relevant for making corporations accountable in cases of water privatisation. The following section discusses some corporate driven mechanisms adopted outside the UN system and their relevance for attempting to impose human rights responsibilities on corporations.

5 3 7 The OECD's Specific Instance Procedure

A particularly interesting feature of the OECD Guidelines is the Specific Instance Procedure, a complaint procedure introduced in 2000 as part of the revision to the OECD Guidelines.[335] The complaint procedure allows NGOs to submit a "specific instance" or "complaint" about alleged breaches of the OECD Guidelines by a corporation to the National Contact Point (hereinafter referred to as the NCP).[336]

---

[330] See *Special Rapporteur* report para 17.
[331] Para 23.
[332] Para 22.
[333] Para 26.
[334] Para 59.
[335] See generally Clapham *Non-State Actors* 207-211.
[336] 208.

The OECD Guidelines represent a landmark development in an attempt to impose human rights responsibilities on MNCs, particularly in light of the new chapter on human rights adopted in the 2011 revision. Before the adoption of the Ruggie Framework by the Human Rights Council in June 2011, the OECD Guidelines were the only multilateral international instrument adopted by States to hold MNCs to account. Additionally, the geographical scope of the OECD Guidelines extends beyond the territory of the State Parties to the OECD to allow other States outside of that economic grouping to adhere to the OECD Guidelines.[337] Although it has its weaknesses one of which is its non-judicial nature, the complaints mechanism under the OECD Guidelines remains the only existing international mechanisms for regulating MNCs.[338] Through its specific instance mechanism, the OECD Guidelines possess a unique feature that provides the means to actively attend to and potentially resolve conflicts between aggrieved communities and corporations.[339] The mechanism makes it relevant for holding corporations to account in water privatisation situations.

The OECD Guidelines provide for any legal or natural person to submit any complaint to the relevant NCP under the Specific Instance Procedure[340] of the OECD Guidelines. Such complaints can be against MNCs operating from an adhering country. Upon receipt of a complaint, the NCP is obliged to make an initial assessment of whether the issues raised merit further examination. Where the NCP determines that the complaint merits further examination, it offers its good offices to help the parties involved to resolve the dispute.[341] If an NCP decides to proceed to examine a complaint, it is expected to play a mediation role in bringing the parties together to resolve the issue. The results of the procedure can only be made public after consultation with the relevant parties. Confidentiality may be maintained if it is determined that preserving confidentiality would be in the best interests of effective implementation of the OECD Guidelines.[342]

---

[337] The OECD Guidelines have been adopted by the thirty-four OECD member states as well as Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru and Romania.

[338] See JL Černič "Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises" (2008) 4 *Hanse Law Review* 71 96.

[339] 76-77.

[340] One of the functions of the NCP is to provide a forum to assist in resolving questions regarding the consistency of a MNCs' activities with the OECD Guidelines. A request for such assistance is referred to as a "specific instance." The NCP determines whether a specific instance merits its involvement based on the 2000 Procedural Guidance discussed above.

[341] OECD Guidelines *Procedural Guidance* para IB.

[342] Para 4(b).

An analysis of the grievance procedure under the OECD Guidelines clearly illustrates its positive contribution. The grievance procedure, as will be illustrated through the discussion of some cases below, has contributed to some form of remedy for the victims of corporate abuse. The mechanism has contributed to behavioural change in the way corporations operate their business activities and improvements in the environmental and human rights conditions on the ground.[343] The Specific Instance Procedure may be an important forum for holding non-State water providers accountable given that the majority of such entities have as their home States OECD member States. The world's biggest water corporations such as Veolia Environment (France), Suez Environment (France), ITT Corporation (USA), United Utilities (UK), Severn Trent (UK) and Thames Water (UK) are from OECD member States. This makes the OECD Specific Instance Procedure a promising avenue for holding such corporations accountable for the human right to water in privatisation situations.

5 3 8 Select "jurisprudence" under the OECD's Specific Instance Procedure

As of March 2012, a total of 128 cases have been filed under the Specific Instance Procedure by NGOs against corporations from the time the first case was filed in 2001. Of these 128 cases, 106 related directly to human rights concerns, 38 concerned information disclosure, 44 related to employment and industrial relations, 68 were concerned with environmental issues, 21 to bribery, 8 related to consumer interests among others.[344] This section highlights select cases decided by various NCPs under the OECD's Specific Instance Procedure. Although the cases do not directly relate to the right to water within privatisation contexts, they serve to illustrate the potential of the Specific Instance Procedure to hold MNCs accountable for human rights, including those involved in the provision of water services.

5 3 8 1 *The Centre for Human Rights and Environment and others v Nidera*

The complaint was filed with the Netherlands NCP on 26th June 2011 by a group of Argentine and Dutch NGOs.[345] The complainants alleged that Nidera, a Dutch based MNC, had abused the human rights of temporary workers at its corn seed processing

[343] OECD Watch *10 Years on: Assessing the contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct* (2010) 21.
[344] OECD Watch (2012) 7 *Quarterly Case Update* 16 <www.oecdwatch.org/cases> (accessed 16.06.2012).
[345] OECD Watch (2012) 7 *Quarterly Case Update* 16.

operations in Argentina in breach of the OECD Guidelines. The complaint detailed the poor living and working conditions at the seed plants.[346] The complainants demanded that Nidera should develop and implement an effective company-wide human rights policy and commitment including concrete human rights due diligence procedures.[347] Such procedures would enable Nidera to identify, prevent and mitigate any actual and potential adverse human rights impacts throughout its global operations, especially the company's hiring and employment processes of temporary workers in its operations.[348]

The NCP conducted an initial assessment and subsequently accepted the case for further consideration. The NCP facilitated a series of meetings in which the parties to the complaint agreed on the best way to address the issues raised in the complaint.[349] The resulting agreement enjoined Nidera to strengthen its human rights policy. Furthermore, Nidera agreed to adopt human rights due diligence procedures for temporary rural workers, and allowed the NGOs to monitor its Argentine corn seed operations through field visits.[350] This agreement was publicised through a statement issued by the Netherlands NCP on the 5th March 2012.[351]

5 3 8 2 *European Centre for Constitutional and others v Otto Stadtlander GmbH and others*

The complaint was filed with the France, Germany, Switzerland and the UK NCPs.[352] Human rights NGOs, the European Centre for Constitutional and Human Rights (hereinafter referred to as "ECCHR"), Association Sherpa and German Forum for Human Rights filed a joint complaint on 25th October 2010 against seven cotton dealers from France, Germany, Switzerland and the United Kingdom. The complainants alleged that the seven corporations were knowingly profiting from child labour in the Uzbek cotton industry in breach of the OECD Guidelines.[353]

The UK NCP proceeded to facilitate an agreement between ECCHR, Cargill Cotton and ICT Cotton UK on a number of concrete measures to be undertaken by

[346] 16.
[347] 16.
[348] 16.
[349] 16.
[350] 16.
[351] 16.
[352] 10.
[353] OECD Guidelines Chapter II (General Policies) paras 1, 2 &10 and Chapter V (Employment) paras 1b &1c.

the companies in order to improve the human rights situation of their operations in Uzbekistan. The parties also agreed to regularly inform each other about progress made in improving the human rights situations of their supply chains.[354]

The Swiss NCP also accepted the three complaints against Swiss companies ECOM, Paul Reinhart and Louis Dreyfuss in March 2011. The Swiss NCP acknowledged the corporations' responsibility for conditions in their supply chains. The companies accepted the NCP's offer to facilitate a dialogue between the parties. Mediation was successful, and in the final agreement the corporations acknowledged their responsibility for the child labour situation in their Uzbekistan supply chains. Significantly, the corporations promised to take steps to eradicate and prevent child labour in their Uzbek supply chain.[355]

The case against Otto Stadtlander was handled by the German NCP. The corporation agreed to an NCP-mediated dialogue with ECCHR that ended successfully with an agreement in December 2011. The company agreed to take measures to avoid forced child labour in its supply chains and to report back to the NCP on the action it had taken within one year. The agreement gained further significance when the German government subsequently took a strong position against the use of child labour in the Uzbekistan cotton industry.[356]

5 3 8 3 *Framtiden i våre hender (Future in Our Hands) v Intex Resources*

The complaint was filed against Norway-based Intex Resources with the Norwegian NCP on 26th January 2009 and concluded on 28th April 2011. The complaint alleged that the company's planned nickel mine and factory in the Mindoro Province of The Philippines would violate the human and environmental rights of indigenous peoples.[357] The complaints argued that the company's prospecting agreement encroached on the Mangyan, Alangan and Tadyawan indigenous groups' land. The complainants further argued that although the indigenous groups had property rights in the land in question, they were not properly consulted on the proposed project. In addition, the complaint alleged that the proposed factory threatened vital water resources because of its proximity to rivers that provide water to neighbouring

[354] OECD Watch (2012) 7 *Quarterly Case Update* 10.
[355] 11.
[356] 10-11.
[357] 14.

villages and agricultural fields.[358] The corporation refused to participate in the mediation proposed by the Norwegian NCP.

The NCP's issued its statement on the 28th April 2011 in which it recognised the importance and relevance of obtaining the free, prior and informed consent of affected indigenous peoples in compliance with the OECD Guidelines.[359] The Norwegian NCP concluded that Intex had failed to undertake a systematic risk assessment of the affected indigenous groups and had not properly consulted the affected groups.[360] Although Intex had acquired the free, prior informed consent of two affected indigenous groups, the NCP stated that such a process was inadequate as the company did not translate crucial information into local indigenous languages. The NCP pointed that the two indigenous groups were not able to understand vital information regarding the potential negative effects of the project on the communities and their environment. The NCP also recommended that Intex identify and consult all indigenous communities potentially affected by the proposed project. The NCP affirmed the importance of corporations conducting due diligence assessments throughout all stages of a project, including the initial planning phase.[361] The NCP's statement contains several recommendations for how Intex can better bring itself in line with the OECD Guidelines. The recommendations addressed issues such as community engagement, disclosure of relevant, timely and understandable information, transparency and the importance of establishing company-level grievance mechanism.[362]

5 3 8 4 *Citizen Participation Forum for Justice and Others v Barrick Gold Corporation*

The complaint was filed on 9th June 2011 and is still pending before the Argentina NCP. The complaint alleged that Barrick Gold Corporation (hereinafter referred to as "Barrick") has breached the OECD Guidelines' provisions on disclosure, environment and general policies at the company's Veladero and Pascua Lama gold mines in the Argentine San Juan province.[363]The complainants allege that Barrick has systematically polluted groundwater, air, soil and glaciers leading to the loss of

[358] 14.
[359] 14.
[360] 14.
[361] 14.
[362] 14.
[363] 6.

biodiversity around the mines.[364] The complainants also highlighted the corporation's negative impact on the local population's health and the deteriorating regional economy resulting from the destruction of natural landscapes and restrictions on access to land and water resources.[365]

The complainants further alleged that Barrick has violated the right to information and improperly involved in local political decision making, and used violence against social and environmental organisations. The complainants demanded Barrick to actively engage with and consult the affected communities, conduct an interdisciplinary environmental analysis, and to initiate studies to investigate negative impacts on the local population's heath.[366]

5 3 8 5 Significance of the OECD Guidelines' Specific Instance Procedure

The outcomes from some of the mediated agreements under the OECD's Specific Instance Procedure illustrate the positive elements of the mechanism and its immense potential for holding corporations accountable for human rights.[367] Even in cases where there was no agreement, statements from the NCPs, for instance in the Norwegian case, acknowledge the validity and legitimacy of the complainant's concerns. Furthermore, the NCP proceeded to make a determination on whether the OECD Guidelines were breached. The statement also provides recommendations to the corporation on how it can better implement and uphold the OECD Guidelines.

In some cases, the existence of a complaint can prompt a resolution of the case in another forum. A case lodged by Germanwatch against Continental AG provides a good example.[368] The complaint attracted media attention and eventually members of the German parliament helped to settle the case even though there was no agreement within the Specific Instance Procedure under the Mexican or the German NCPs.[369] A complaint under the Specific Instance Procedure can generate media attention, raise awareness, and lead to increased public pressure on corporations to improve their human rights behaviour.[370] A case raised by the Australian Conservation Foundation against ANZ Bank was rejected by the

[364] 6.
[365] 6.
[366] 6.
[367] OECD Watch *10 Years on* 22.
[368] See *Germanwatch v Continental AG* (2002) <http://oecdwatch.org/cases/Case_24> (accessed 23.06.2012).
[369] OECD Watch *10 Years on* 22.
[370] 22.

Australian NCP.[371] The media attention generated by the case resulted in a review of the applicability of the OECD Guidelines to the financial sector. This resulted in ANZ becoming the first Australian bank to develop a forestry and biodiversity policy.[372] This should be regarded as a positive outcome.

Significantly, the State-backed weight attached to the OECD Guidelines provides authority to NCP statements and the importance of an NCP's findings and recommendations. Furthermore, the fact of the NCP publicly finding corporations to be in breach of the OECD Guidelines should not be underestimated. Additionally, a clear and strong statement from the NCP and the accompanying recommendations can contribute to a better understanding of how corporations should conduct their operations in a human rights compliant manner.[373] The above clearly makes the Specific Instance Procedure a promising mechanism for holding water corporations accountable for any breaches of the right to water in privatisation situations. The procedure might need strengthening especially in the enforcement of the NCPs' findings to make such decisions more credible. The OECD Specific Instance Procedure is nevertheless a potentially revolutionary procedure for holding corporations accountable in the absence of directly binding norms for such entities under international law.

5 4 Emergence and rise of voluntary corporate standards

Corporations have, for the most part vigorously resisted mandatory regulation under international law.[374] Corporations are, however, attempting to address the gap in global economic governance by using their powerful position to adopt voluntary minimum standards of their own. The last fifteen years have seen the emergence of multi-actor initiatives, initially collaborations between corporations and non-governmental organisations (hereinafter referred to as "NGOs") and more recently, trilateral voluntary schemes involving States, corporations and NGOs.[375]

[371] 22.
[372] 22.
[373] 22.
[374] Abbott & Snidal 2009 *Vanderbilt Journal of Transnational Law* 504.
[375] 519

Some big corporations have responded to public demand and reputational concerns by adopting corporate codes of conduct and sectoral self-regulation initiatives.[376] Graham and Woods have referred to this ‘‘self-regulation’’ as “attempts by corporations to establish rule-based constraints on behaviour without the direct coercive intervention of States or other external actors.”[377] Prominent among these are corporate codes of conduct, trade association codes, multi-stakeholder codes and State-backed voluntary codes. Such codes commit participants to minimum standards of human rights, labour, environmental and related standards.[378]

States most directly concerned with pressing problems are increasingly collaborating directly with business and civil society to establish voluntary regulatory systems in specific operational contexts.[379] Thus, in addition to the increasing number of sectoral and internal corporate codes of conduct, one can observe a progression into increasingly complex multi-actor voluntary regulatory initiatives.[380] These innovative State-backed and multi-stakeholder hybrid mechanisms make them relevant in regulating non-State actors in situations where water services have been privatised. This is particularly so in the absence of international instruments directly binding on non-State actors.[381]

A body of scholarship has focused on the rise of these self-regulation and other multi-stakeholder voluntary initiatives. The focus is on the ways in which corporations and NGOs could play an increasingly important role in generating, deepening, and implementing transnational norms in such areas as human rights.[382] Teubner has referred to this development as the *lex mercatoria*, noting that:

> “[An] increasing role is played by non-State actors, even in law making, as has been demonstrated by the emergence of the new *lex mercatoria*...the transnational law of economic transactions.”[383]

---

[376] T Bartley “Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions” (2007) 113 *American Journal of Sociology* 297 300.
[377] Graham & Woods 2006 *World Development* 868.
[378] 869.
[379] UN Human Rights Council *Guiding Principles on Business* para 85.
[380] Abbott & Snidal 2009 *Vanderbilt Journal of Transnational Law* 519.
[381] United Nations Human Rights Council *Business and Human Rights: Mapping International Standards* para 85.
[382] Graham & Woods 2006 *World Development* 868-869.
[383] G Teubner “Global Bukowina: Legal Pluralism in the World” in G Teubner (ed) *Global Law Without a State* (1997) 3–28.

This development has also been described as forming a constituent part of global administrative law "though much of this transformation takes place beneath the surface of the international legal order and often goes unnoticed."[384] Bob Hepple has also used the theory of reflexive regulation as an entry-point for understanding legislatively and judicially motivated models of participation in employment equity and socio-economic rights in South Africa.[385] Abbot and Snidal have referred to this adoption and implementation of non-binding, voluntary standards of business conduct by corporations, NGOs and Intergovernmental Organisations (hereinafter referred to as "IGOs") as forms of "regulatory standard-setting."[386] The two authors argue that this cacophony of soft law norms is developing into a system of transnational governance for business.[387]

5 4 1 Characteristics of this new regulatory phenomenon

Abbott and Snidal have pointed to two particularly striking features about these new regulatory initiatives.[388] The first is the central role of private actors, operating singly and through novel collaborations, and the correspondingly modest and largely indirect role of the State.[389] Significantly, most of these arrangements are monitored by NGOs, labour unions, corporations and industry groups whose own activities or those of their supply chains are the targets of regulation.[390] Although States are not central to their governance or operations, States and IGOs often support and even participate in some of these largely corporate-driven initiatives.[391]

---

[384] N Krisch & B Kingsbury Introduction: Global Governance and Global Administrative Law in the International Legal Order (2006) 17 *The European Journal of International Law* 1-13.

[385] According to Hepple:

> "This kind of regulation involves three interlocking mechanisms. The first is internal scrutiny by the organisation itself to ensure effective self regulation. The second is the involvement of interest groups (such as managers, employees and service users) who must be informed, consulted and engaged in the process of change. The third is an enforcement agency which should provide the back-up role of assistance, building capabilities, and ultimately imposing sanctions where voluntary methods fail. These interlocking mechanisms create a triangular relationship among those regulated (e.g. employers), others whose interests are affected (e.g. workers and consumers), and the enforcement agency as the guardian of the public interest." See B Hepple "Negotiating Social Change in the Shadow of the Law" (2012) 159 *The South African Law Journal* 248 255.

[386] Abbott & Snidal 2001 *Journal of European Public Policy* 345.

[387] 509.

[388] 505.

[389] 505.

[390] 505.

[391] Meidinger calls such arrangements "supragovernmental", because they are established by private actors with governments playing only minor roles. See E Meidinger *Competitive Supragovernmental Regulation: How Could It Be Democratic?* (2008) 8 *Chicago International Law Journal* 513 516.

Significantly, traditional State-based international regulatory arrangements have begun to take innovative forms.[392] IGOs such as the UN, through its Global Compact, and the OECD through its OECD Guidelines engage firms they are meant to influence in the regulatory process. The second feature is the voluntary rather than State-mandated nature of these regulatory norms as corporations or NGOs lack the authority to promulgate binding law.[393] It is however noteworthy that even IGO initiatives such as the UN Global Compact or the OECD Guidelines, for instance, operate through a voluntary soft law approach rather than the traditional hard law of binding treaties.[394]

5 4 2 Examples of corporate-driven voluntary initiatives

This section highlights some corporate-driven voluntary initiatives. Although such initiatives do not necessarily directly apply to water privatisation situations, some of these mechanisms provide good practices for holding corporations accountable. The best practices, principles and accountability mechanisms derived from such mechanisms can be useful tools for holding corporations involved in the provision of water services accountable in the absence of binding norms. Two early corporate initiatives, The Body Shop's *Trade Not Aid Initiative* adopted in 1991[395] and GAP Incorporated's *Individual Labour Rights Scheme* adopted in 1992 represent the subsequent cascade of corporate self-regulation.[396] Another earlier sectoral initiative is the chemical industry's *Responsible Care* programme launched in 1985 by the Canadian Chemical Producers Association as a response to the 1984 Bhopal Gas Disaster in India. It is an early industry-wide self-regulatory global initiative that drives continuous improvement in health, safety and environmental performance, together with open and transparent communication with stakeholders.[397] It has since evolved into a global soft law mechanism in that sector through the adoption of a UN backed

[392] Abbott & Snidal 2009 *Vanderbilt Journal of Transnational Law* 506.
[393] These norms are "voluntary" in the sense that they are not legally required; however, firms often adhere because of pressure from NGOs, customer requirements, industry association rules, and other forces that render them mandatory in practice.
[394] Abbott & Snidal 2009 *Vanderbilt Journal of Transnational Law* 506.
[395] See Body Shop Trade Not Aid Initiative <http://www.thebodyshop-usa.com/values-campaigns/community-trade.aspx> (accessed 23.06.2012).
[396] These typically include a code of conduct and more or less extensive procedures for implementation and monitoring. See Abbott & Snidal 2009 *Vanderbilt Journal of Transnational Law* 517.
[397] See Responsible Care <http://www.icca-chem.org/en/Home/Responsible-care/> (accessed 23.06.2012).

Responsible Care Global Charter in 2006.[398] Initiatives such as the *Forestry Stewardship Council* (hereinafter referred to as the "FSC") represent joint efforts between NGOs and corporations to promote sustainable forestry through the *Forestry Stewardship Council Principles and Criteria for Forestry Stewardship*. The FSC Principles and Criteria for Forest Stewardship was adopted in 1994 and recently amended in 2012 and contains 10 principles that must be applied in any forest management unit before it can be granted FSC certification.[399]

Although many of these soft law initiatives entail an indirect role for the State, for instance the use of State-created standards, a growing number involve significant State participation. The Global Reporting Initiative (hereinafter referred to as the "GRI") works closely with intergovernmental organisations such as the UN Environment Programme and the International Organisation for Standardisation to develop organisational reporting guidance for corporations on environment and social justice.[400] It also helps in ensuring corporate transparency and accountability in the conduct of operations through the use of a Sustainability Reporting Framework.[401] Some of the key initiatives include the Equator Principles, a banking industry initiative encouraged by the World Bank's International Finance Corporation (hereinafter referred to as the "IFC") and based on the IFC Environmental and Social and Standards.[402] The ILO Tripartite Declaration, although a State-backed mechanism,

---

[398] See Responsible Care Global Charter <http://www.icca-chem.org/Global/Initiatives/RC_Global> (accessed 23.06.2012).

[399] See Forestry Stewardship Council *Forestry Stewardship Council Principles and Criteria for Forest Stewardship* <http://www.fsc.org/principles-and-criteria.34.htm> (accessed 23.06.2012). Other initiatives include the Fairtrade Labeling Organisation, an umbrella organisation for national fair trade programs, Social Accountability International which promotes worker rights principles and management systems and the Fair Labor Association which promotes worker rights in transnational apparel production.

[400] The Global Reporting Initiative (GRI) is a non-profit organisation that promotes economic, environmental and social sustainability. GRI provides companies and organisations with a comprehensive sustainability reporting framework. The Reporting Framework includes the Reporting Guidelines, Sector Guidelines and other resources – which enable greater organisational transparency about economic, environmental, social and governance performance. See https://www.globalreporting.org/Pages/default.aspx (accessed 23.08.2012).

[401] See Global Reporting Initiative *Reporting Framework Overview*.

[402] The Equator Principles are a voluntary set of standards for determining, assessing and managing environmental and social risk in project finance transactions. The Equator Principles were developed by private sector banks led by Citigroup, ABN AMRO, Barclays and WestLB and were launched in June 2003. The drafting financial institutions chose to model the Equator Principles on the social and environmental standards of the World Bank and the social policies of the International Finance Corporation and have become the *de facto* standard for banks and investors on how to assess major development projects around the world. The Equator Principles are primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making. Project Finance is often used to fund the development and construction of major infrastructure and industrial projects. The Equator Principles are adopted by financial institutions and are applied where total project capital

also serves as a platform for the engagement of governments, labour and business in standard-setting.[403]

Some of the more recent initiatives include the Voluntary Principles on Security and Human Rights drafted by States, energy corporations and human rights NGOs to promote corporate human rights risk assessments and training of security providers in the extractive sector.[404] The participating States are Canada, Colombia, Switzerland US, UK, the Netherlands and Norway. Some of the participating corporations are BHP Billiton, BP, ChevronTexaco, ConocoPhillips, ExxonMobil, Rio Tinto, Shell and Statoil. Human rights and humanitarian organisations such as Amnesty International, Fund for Peace, Human Rights Watch, Human Rights First, International Alert, Oxfam and the International Committee of the Red Cross are also participants in the Voluntary Principles on Security and Human Rights. Other State-backed organisations such as the International Finance Corporation and the International Committee of the Red Cross have observer status.[405]

The Kimberley Process Certification Scheme (hereinafter referred to as "KPCS") was initiated by Southern African diamond-producing States in 2000 to stem the flow of conflict diamonds and became operational from 2003.[406] The KPCS is one

---

costs exceed US$10 million. See Equator Principles http://www.equator-principles.com/index.php/> (accessed 27.07.2012).

[403] The ILO Tripartite Declaration, adopted in 1977 sets out principles which governments, employers' and workers' organisations, and MNCs are recommended to observe on a purely voluntary basis. The ILO Declaration is non-binding and primarily deals with labour related issues such as health and safety, the minimum age of employment, and conditions and benefits of work. Parties to the ILO Declaration also bind themselves to respect the Universal Declaration of Human Rights and corresponding international covenants as well as the Constitution of the ILO. Although a voluntary instrument, the ILO Declaration may also be seen as an authoritative interpretation of some of the ILO Conventions and Recommendations on which it is based. Seen together with the treaties and customary international law relevant to labour rights, the ILO Declaration becomes a useful tool for determining the human rights obligations of non-State actors. The ILO's Multinational Enterprises Programme (EMP/MULTI) is responsible for the promotion of the ILO Declaration. Monitoring mechanisms include a periodic survey of the implementation of the ILO Declaration's provisions, and a mechanism for adopting advisory opinions by the MNE Segment of the Policy Development section of the ILO's Governing Body (previously the Subcommittee on Multinational Enterprises). The ILO Declaration explicitly makes reference to human rights and this is significant for MNCs. It specifically enjoins all parties to the ILO Declaration to "respect the Universal Declaration of Human Rights and the corresponding international Covenants adopted by the General Assembly of the United Nations." The ILO Declaration further provides that all parties concerned with the instrument should not only "respect the sovereign rights of States, obey the national laws and regulations," but also "give due consideration to local practices and respect relevant international standards." See ILO Tripartite Declaration para 8. For further discussions on the ILO Declaration see Clapham *Non-State Actors* 212.

[404] See Principles on Security <http://www.voluntaryprinciples.org/files/> (accessed 14.05.2012) .

[405] See List of Participants to the Voluntary Principles on Security <http://www.voluntaryprinciples.org/> (accessed 15.06.2012).

[406] See Kimberly Process Certification Scheme <http://www.kimberleyprocess.com/documents/> (accessed 28.07.2012).

of the major multi-stakeholder initiatives that have played a crucial role in helping to reduce the flow of conflict diamonds.[407] Participants in the KPCS can only legally trade with other participants who have also met the minimum requirements of the scheme. Significantly, the KPCS rules provide that any international shipments of rough diamonds by a participating entity must be accompanied by a KPCS certificate guaranteeing that such diamonds are conflict-free.[408] As of July 2012 the KPCS had 50 participants, representing 76 countries, with the European Union and its Member States counting as a single participant, civil society organisations and the World Diamond Council representing the international diamond industry.[409]

The Extractive Industry Transparency Initiative (hereinafter referred to as the "EITI") is another key voluntary mechanism composed of States,[410] corporations, civil society groups such as Transparency International, Open Society Institute, Oxfam and Global Witness and intergovernmental organisations such as the African Union, the European Commission and the OECD. The EITI is a globally developed standard that promotes revenue transparency at the local level in which corporations report on the proceeds they pay to the State and the State reports on the revenue it receives from mining corporations.[411]

5 4 3 Significance of soft law initiatives for holding non-State actors accountable

Most voluntary mechanisms have been created from the bottom up by societal actors, often in response to perceived State failure to regulate as well as pressure from the public and civil society actors.[412] Developing States' inability or unwillingness to regulate gives these voluntary initiatives significant potential to ameliorate such State regulatory inadequacies which created space for these

[407] The KPCS has reduced the flow of conflict diamonds to one percent of the total market from three or four percent since the voluntary scheme became operational in 2003. See UN Human Rights Council *Business and Human Rights: Mapping International Standards* para 59.
[408] See *Kimberly Process Certification Scheme* sections 2 & 3.
[409] See *KPCS List of Participants* <http://www.kimberleyprocess.com/web/kimberley-process/kp-participants-and-observers> (accessed 18.06.2012).
[410] As of July 2012 the ETTI had a membership of 16 States.
[411] See Extractive Industry Transparency Initiative Rules (2011) <http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf> (accessed 18.07.2012). The EITI Rules bring together the EITI's Requirements for implementing the EITI. These include the EITI Principles, Criteria, Requirements, Validation Guide, and Policy Notes issued by the EITI International Secretariat, conveying decisions taken by the EITI Board.
[412] Abbott & Snidal 2009 *Vanderbilt Journal of Transnational Law* 521.

mechanisms to develop.[413] These initiatives seek to close regulatory gaps that contribute to human rights abuses by corporations. It is important to note that as these soft law initiatives strengthen their accountability mechanisms, they also begin to blur the lines between the strictly voluntary and mandatory spheres for participants.[414] A good example is the *IFC Performance Standards for Corporations*[415] and the *Equator Principles*.[416] No corporation is obliged to accept World Bank funding through the IFC. If, however, a corporation accepts such funding, it must comply with certain performance criteria provided under the *Equator Principles* and the *IFC Performance Standards For Corporations* to be eligible for continued funding. States and corporations are free to join and participate in the EITI, but if they do, extractive corporations are required to issue public reports of their payments to States. States also have to report on the revenue they receive from corporations within their jurisdiction participating in the EITI. Significantly, suspension or expulsion from KPCS has a direct economic impact on States and corporations involved in the diamond mining industry.[417]

One study has, for example, shown that the OECD Guidelines' "soft sanctioning power has the potential to alter corporate behaviour in the long run" if the OECD Guidelines' ability to "consistently discriminate between good and bad

[413] The weakness of the State is frequently seen as a major reason for the rise of such voluntary initiatives. G de Búrca & J Scott "Narrowing the Gap? Law and New Approaches to Governance in the European Union: Introduction" 2007 (13) *Columbia Journal of European Law* 513 513-514.

[414] UN Human Rights Council *Business and Human Rights: Mapping International Standards* para 61.

[415] The International Financial Corporation (IFC)'s Policy and Performance Standards on Environmental and Social Sustainability are directed towards clients, providing guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way. These include stakeholder engagement and disclosure obligations of the client in relation to project-level activities. Together, the eight Performance Standards establish standards that the client is to meet throughout the life of an investment by IFC. See IFC *Performance Standards on Environmental and Social Sustainability* (2012) http://www1.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES (accessed 23.07.2012).

[416] The Equator Principles are a voluntary set of standards for determining, assessing and managing environmental and social risk in project finance transactions. The Equator Principles were developed by private sector banks led by Citigroup, ABN AMRO, Barclays and WestLB and were launched in June 2003. The drafting financial institutions chose to model the Equator Principles on the social and environmental standards of the World Bank and the social policies of the International Finance Corporation and have become the *de facto* standard for banks and investors on how to assess major development projects around the world. The Equator Principles are primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making. Project Finance is often used to fund the development and construction of major infrastructure and industrial projects. The Equator Principles are adopted by financial institutions and are applied where total project capital costs exceed US$10 million. See Equator Principles http://www.equator-principles.com/index.php/> (accessed 27.07.2012).

[417] Para 65.

performers" is improved.[418] There is also evidence that voluntary international environmental standards have a positive effect on corporate behaviour. Potoski and Prakash have analysed US firms' compliance with the International Organisation for Standardisation (ISO 14001)'s environmental programme and found a positive impact on corporate behaviour.[419] It is also generally acknowledged that the KPCS has reduced the flow of conflict diamonds to one percent of the total market from three or four percent since the voluntary scheme became operational in 2003.[420]

Although voluntary initiatives contain flexible norms and procedures throughout the regulatory process, from a legal pluralist perspective, however, these norms may be seen as "law" for participating firms. This is because they complement or substitute for mandatory "hard law."[421] The MNCs' involvement in the provision of water services to a considerable extent is beyond the control of one single State. This is due to the size and geographical operations of such MNCs coupled with home States' reluctance and host States' inability to regulate. Tamanaha has noted that legal pluralism can be observed through a multiplicity of legal orders, from the lowest local level to the most expansive global level. These include State, regional, village, town, or municipal, transnational and international laws of various types.[422] In addition, in many societies there are customary, indigenous and religious laws connected to distinct ethnic or cultural or religious groups within a society. There is also an evident increase in quasi-legal activities, from private policing and judging, to privately run prisons, to the ongoing creation of the new *lex mercatoria*, a body which is almost entirely the product of private law-making activities.[423]

While most academic and political debates about the law are still directed at the concept of a national legal order with a centralised and public legislation, more and more law-making actors appear besides the national legislators which operate in different transnational legal fields and on different levels.[424] Examples include the European Union law that fundamentally transforms the national law of the member

---

[418] L Baccaro & V Mele *For Lack of Anything Better? International Organisations and Global Corporate Standards* (2010) 1.
[419] P Bernhagen & NJ Mitchell "The Private Provision of Public Goods: Corporate Commitments and the United Nations Global Compact" (2010) 54 *International Studies Quarterly* 1175 1176.
[420] UN Human Rights Council *Business and Human Rights: Mapping International Standards* para 59.
[421] Abbott & Snidal 2009 *Vanderbilt Journal of Transnational Law* 530.
[422] BZ Tamanaha "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 *Sydney Law Review* 375 375.
[423] 375.
[424] K Günther "Legal Pluralism or Uniform Concept of Law? Globalisation as a Problem of Legal Theory" (2008) 5 *NoFo* 5 5.

States. Of significance is also the law making powers of institutions such as the World Bank, IMF and the WTO. Although the later organisations still submit to the will of their member States, the same is not true for the many non-State actors operating on the different transnational fields. In areas such as the World Wide Web, technology and sports, for instance, private entities create their own law without any involvement of public legislatures. MNCs, as indicated above, are likely to solve their contractual conflicts according to MNC-established *lex mercatoria* which is interpreted by private arbitration tribunals.[425]

The above issues are important in the understanding of law. Firstly, when there are many different public and private law-making entities participating in different areas and on different local, international or supranational levels, then a uniform concept of law is hard to maintain.[426] Rather, legal theory has and must deal with many different and diverse normative systems.[427] Günther argues that the positivist concept of a "single legal system that is logically ordered and hierarchically differentiated turns into a plurality of legal regimes."[428] Legal pluralism, according to Günther, seems to "turn the idea of a unified legal system into a mere fiction."[429] The importance of legal pluralism is in its recognition of various norms beyond State-promulgated norms to include norms created by corporations and other non-State actors. Such norms, albeit with some weaknesses, constitute an important development in a bid to hold corporations to account in the absence of international law norms directly binding on corporations.

John Braithwaite has argued that these voluntary initiatives are valuable for developing States that lack essential capacities for traditional regulation in the absence of internationally binding obligations on corporations.[430] Some voluntary initiatives draw on the often greater resources and capacities of corporations. For example, inspections of suppliers may be more effective when performed by knowledgeable corporations or NGOs than by public inspectors who may lack the necessary expertise. The water privatisation experience in South Africa discussed above highlighted the local authority's incapacity to effectively monitor the water

[425] 6.
[426] 6.
[427] 6.
[428] 6.
[429] 6.
[430] J Braithwaite "Responsive Regulation and Developing Economies" (2006) 34 *World Development* 884 884-885.

concession which also contributed to its dismal performance.[431] For instance in the case of Nelspruit, the Compliance Monitoring Unit set up by the City Council to monitor the performance of the private water provider was dysfunctional. In some cases, such as that of the Eastern Cape municipalities, the councillors mandated to monitor the private water providers lacked the requisite expertise to do so.[432] Such voluntary initiatives will likely reduce resource demands on the State. This constitutes a significant advantage in an era when many States and agencies face both shrinking resources and budget cuts.[433]

5 4 4 Limitations of voluntary schemes

Although voluntary mechanisms show real promise for strengthening international regulation by filling regulatory gaps,[434] a "wholly decentralised and spontaneous standard-setting process can produce a cacophony of incompatible standards."[435] Corporations pressured to adhere to multiple voluntary initiatives face heightened "transaction, implementation, and organisational costs."[436] Significantly, corporations that face a multiplicity of voluntary initiatives of different degrees of stringency can shop for the most corporate-friendly. This may create incentives for competing initiatives to relax their standards.[437] There is the added problem that some firms may prefer self-regulation for its business-friendly standards and perceived lower compliance costs. This results in self-regulation being limited in its efficacy to influence corporate behaviour. This potentially leaves many openings for opportunism by corporations simply joining a voluntary initiative for public relations purposes. Such a phenomenon may create credibility problems for sincere corporations committed to be bound by norms and principles provided in a particular initiative.[438] Although corporations may have unparalleled business expertise and managerial capacity to manage such voluntary initiatives, some mechanisms often

[431] See Chapter 3 above section 3 5 2 7.
[432] Section 3 5 2 7.
[433] Meidinger *Competitive Supragovernmental Regulation* 519–520.
[434] Abbott & Snidal 2009 *Vanderbilt Journal of Transnational Law* 545.
[435] 545.
[436] 551.
[437] 551.
[438] 548.

lack independence and are likely to be motivated by corporations' narrow economic interests.[439]

Some of the limitations of voluntary codes include lack of principled normative development applicable on the basis of equality of rights-holders and duty-bearers. Additionally, some corporate codes usually include only vague non-operational statements on respect for human rights, and are lacking in transparency and effective enforcement mechanisms.[440] Corporations are often not willing to be subjected to independent external monitoring procedures that would ensure compliance with their own codes. The result is that such voluntary standards tend to be limited to what the corporation already does well and ignore the problematic issues.[441]

Despite these challenges, voluntary initiatives remain helpful for holding non-State actors accountable in the absence of directly binding human rights obligations on corporations. Such mechanisms, in conjunction with domestic legislation can play a role in holding private water providers accountable in the face of inability or unwillingness of States to regulate.

5 4 5 The State's role in voluntary regulatory mechanisms

It is significant to note that despite the voluntary nature of the emerging voluntary mechanisms, the State can still play an important role especially with regard to corporate-driven initiatives operating within their domestic jurisdictions. States can convene, encourage and provide material and logistical support in the creation of multi-stakeholder voluntary initiatives. States can also participate and collaborate in such initiatives and influence "their norms, structure, and procedures through their terms of collaboration."[442] States can also provide legitimacy and moral support for such mechanisms by participating in such schemes.[443] States can also require such voluntary mechanisms to abide by procedural and substantive norms applicable to public law such as due process and set minimum standards and other substantive parameters.[444]

---

[439] 549.
[440] SP Sethi *Setting Global Standards, Guidelines for Creating Codes of Conduct in Multinational Corporations* (2003) 84.
[441] 84.
[442] 549.
[443] 574.
[444] 574.

Abbott and Snidal have argued that for those voluntary mechanisms operating within their domestic jurisdiction, the State should be in a position to step in with mandatory regulation. The threat of such intervention reinforces the effectiveness of such voluntary mechanisms.[445] Hepple has also explained the importance of the State's sanctioning power lurking in the background to enhance the effectiveness of voluntary mechanisms.[446] According to Hepple, this kind of regulation involves three interlocking mechanisms.[447] The first involves internal scrutiny by the organisation on its own to ensure effective self-regulation. The second mechanism involves interest groups who must be informed, consulted and engaged in the process of change.[448] The third is an enforcement agency which should provide the back-up role of assistance and imposing sanctions where voluntary methods prove ineffectual.[449] According to Hepple, these interlocking mechanisms create a triangular relationship among those regulated, stakeholders whose interests are affected, and the enforcement agency to safeguard the public interest.[450] The following section discusses the above initiatives and related voluntary mechanisms' relevance in holding non-State actors accountable within the context of water privatisation.

5 4 6 Potential of soft regulatory mechanisms as a basis for development of binding norms

The role of the above UN inspired, NGO, IGO and corporate mechanisms and their potential to crystallise into hard law both at the national and international level is important for holding non-State actors accountable in situations where water services have been privatised. These non-binding mechanisms, in the absence of binding norms, help to shape and constrain the practises of corporations involved in the provision of human rights sensitive services as water. Furthermore, such mechanisms may be eventually incorporated into binding national or international law leading to their accretion into hard law.

The significance of the UN Global Compact in the water privatisation sector, for instance, is that it has brought some degree of awareness about corporate

[445] 523.
[446] See B Hepple "Negotiating Social Change in the Shadow of the Law" (2012) 159 *The South African Law Journal* 248 255.
[447] 255.
[448] 255.
[449] 255.
[450] 255.

responsibility for human rights such as water to many MNCs and business corporations. Such an approach has provided a measure of impetus for change of policies.[451] One study demonstrated that the UN Global Compact signalled constructive engagement with corporations.[452] In particular, the UN Global Compact has accelerated policy changes and also revealed practices taking place in local affiliates of MNCs.[453] The UN Global Compact's importance in the water sector is also illustrated by the adoption of the CEO Water Mandate discussed above which specifically addresses water related issues.

The UN Global Compact, for instance, has strengthened its compliance mechanism by adopting, in February 2011, a revised Communication on Progress (hereinafter referred to as "COP").[454] Such a mechanism might, despite the voluntary nature of the initiative, help focus the spotlight on the human rights-infringing activities of those MNCs members to the UN Global Compact involved in the provision of water services.[455]

The COP is the most important expression of a participant's commitment to the UN Global Compact and its principles. A water corporation would, for instance, be required to post its COP on the UN Global Compact website and to share it widely with its stakeholders.[456] Any infringement by the corporation of its COP policy (for instance failure to disclose details of any human rights due diligence relating to its water project) will result in a change in participant status to non-communicating. This can eventually lead to the expulsion of the participant.[457]

The Norms on TNCs also constitute a significant approach to corporate responsibility for the human right to water especially where water services have been privatised. This is despite the SRSG's criticism of the Norms on TNCs for their alleged "exaggerated legal claims" that human rights law directly imposes a wide

[451] Bilchitz *The South African Law Journal* 759.
[452] McKinsey & Company *Assessing the Global Compact's Impact* (2004) 9.
[453] 210.
[454] See United Nations *Global Compact Policy on Communicating Progress* (2011) <http://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy_Feb11.pdf> (accessed 27.06.2012).
[455] The COP is an annual public disclosure to stakeholders such as investors, consumers, civil society and States on the corporation's progress in implementing the UN Global Compact. The COP requirement serves several important purposes. These include advancing transparency and accountability, enable continuous performance improvement, safeguard the integrity of the UN Global Compact and the United Nations and help build a growing repository of corporate practices to promote dialogue and learning. See *Global Compact Policy on Communicating Progress* para 1(a)-(c).
[456] Para 2(a)-(b).
[457] Para 2.

range of duties on corporations.[458] The Norms on TNCs mark a radical departure from previous international efforts aimed at addressing the obligations of non-State actors with regard to human rights.[459] The intention of the UN Sub-Commission in relation to the Norms on TNCs was clearly to provide for legally binding and enforceable obligations for non-State actors. It is also significant to note that, unlike previous initiatives, the Norms on TNCs extend the human rights responsibilities beyond TNCs and provide for the human rights obligations of other business enterprises.[460] The Norms on TNCs offer the promise of holding water corporations directly liable for any infringement of the human right to water. Significantly, the Norms on TNCs provide for monitoring mechanisms that recognise the importance of internal self-regulation and external monitoring. Their interpretation of human rights instruments as imposing direct human rights obligations on corporations differ from the traditional approach which focuses exclusively on States as the sole bearers of human rights obligations.[461] This makes the Norms on TNCs a more promising tool for ensuring that non-State actors such as MNCs and business enterprises involved in the provision of water services respect and protect the right to water.[462]

The UN Framework, Guiding Principles and the Special Rapporteur's study are equally important in understanding the role of corporations in water privatisation scenarios. Although these UN initiatives do not constitute changes to the existing international law, they offer a better understanding of it. These initiatives clarify the duty of corporations to respect the human right to water human as well as the need to carry out due diligence assessments intended to avoid infringing on human rights of others. The above initiatives also elaborate the corporate duties not to infringe on others' right to water. They underscore the necessity of addressing any adverse impacts on the right to water resulting from corporate activities. The above UN initiatives also emphasise the importance of access to an effective remedy (both judicial and non-judicial) for victims of infringements of the right to water.[463]

The OECD Guidelines represent a landmark development in an attempt to impose human rights responsibilities on MNCs, particularly in light of the new chapter on human rights adopted in the 2011 revision. The OECD Guidelines' chapter on

[458] Interim Report of the Special Representative of the Secretary-General para 59.
[459] Chirwa 2006 *South African Journal on Human Rights* 96.
[460] 96.
[461] Williams 2006-2007 *Michigan Journal of International Law* 491.
[462] Chirwa 2006 *South African Journal on Human Rights* 96.
[463] UN *Guiding Principles* para 4.

human rights explicitly recognise the State's obligation to respect and protect human rights including the right to water. Corporations, including those involved in the provision of water services, regardless of size, sector, operational context, ownership and structure are duty-bound to respect human right to water and other related rights wherever they operate. The OECD Guidelines, despite their voluntary nature, clearly illustrates their potential contribution to holding corporations involved in the provision of water services accountable. The outcomes from some of the mediated agreements under the OECD's Specific Instance Procedure illustrate the positive elements of the mechanism and its immense potential for holding corporations accountable for fulfilling their duties in respect of the right to water. The grievance procedure has thus contributed to some form of remedy for the victims of corporate abuse. The mechanism has the potential to contribute to behavioural change in the way corporations involved in the provision of water services operate.

5 5 Conclusion

This chapter highlighted the State-centric nature of the current international human rights framework and the challenges it poses for holding non-State actors accountable for human rights in the era of privatisation and liberalisation. Recent experiences have demonstrated that non-State actors such as corporations can (and often do) abuse human rights such as the right to water. This is particularly the case where States are unable or unwilling to reign in such entities. Such actors are not directly addressed by international and regional human rights treaties despite their increasing involvement in the distribution of human rights sensitive services such as the provision of water. Newly independent States initiated the impetus towards imposing direct human rights obligations on MNCs in the 1970s to prevent incidences of political interference in their domestic affairs by powerful MNCs. One of the earliest attempts at establishing binding obligations on MNCs was the 1974 UN Code of Conduct on TNCs which was the first attempt at the UN level to usher in binding norms to regulate the activities of MNCs. As shown above, disagreements on the content and scope of application of the draft code between the industrialised countries and the developing countries resulted in failure to adopt the envisaged instrument.

A range of non-binding initiatives have since been developed in an attempt to impose human rights responsibilities on non-States actors. The UN has also succumbed to pressure to adopt binding norms on MNCs by embarking on studies aimed at attempting to identify, clarify and elaborate international human rights responsibilities as reflected in the UN Framework and Guiding Principles discussed above. Recent years have seen the emergence of voluntary soft law initiatives involving corporations, States, NGOs, and IGOs in an attempt to impose human rights responsibilities on corporations in the absence of binding international standards.

This chapter sought to identify and discuss the relevance of these norms within the context of water privatisation for holding water corporations to account for their obligation imposed by the human right to water. It was shown that, despite the limitations posed by the breadth and voluntary nature of such initiatives, these mechanisms show real promise for strengthening regulation by filling regulatory gaps against non-State actors. Such initiatives are valuable especially for developing States that are either unwilling or lack the essential capacities to regulate MNCs. These emerging mechanisms, if properly harnessed alongside strengthening the domestic legislation of States, can play an important role in holding private water providers accountable for the human right to water.

It was argued that, in addition to the State's duty to protect against third party infringements of the right, human rights obligations are also imposed directly on corporations by the human right to water. These include the corporation's responsibility to respect the right to water, and the duty to prevent and mitigate abuses of the right to water that are directly linked to their operations. This chapter argued that the private provider of water services should undertake a human rights due diligence process as part of its responsibility to respect the right to water. This process should enable the corporation to identify, prevent, mitigate and account for any impacts on the right to water as a result of its operations. The process should enable the corporation to identify, prevent, mitigate and account for any impacts on the right to water as a result of its operations. Significantly, such a process should specifically address the human rights impact on the most excluded and marginalised individuals and groups. Additionally, the duties to prevent and mitigate abuse of the right to water related to their operations enjoins them to establish or participate in effective operational-level grievance mechanisms for individuals and communities

whose human rights may be adversely impacted by their operations. Clarity on the human rights standards applicable to MNCs is thus important in elaborating the responsibilities of and holding corporations in water privatisation situations. The following chapter focuses on the creation of an accountability model to guide States and non-State actors in the event of privatisation of water services.

Chapter 6

Towards an accountability model to guide State and non-State actors in privatisation of water services

6 1 Introduction

Water privatisation measures must comply with the normative framework imposed by the right to water to be human rights compliant.[1] Special measures have to be taken to ensure that, in the context where water services are privatised, the services provided guarantee the availability, accessibility, quality and acceptability of water services to all people, especially vulnerable communities.[2] To ensure accountability, States and other actors involved in the provision of water services should have clearly designated roles and responsibilities. Involving non-State actors in the provision of water services requires clearly defining the scope of functions delegated to such entities. It is also important to oversee the activities of water services providers through establishing regulatory standards and monitoring compliance with the set standards.[3]

Over and above the obligations attaching to the State with regard to the right to water, non-State actors also have duties imposed on them by the right to water.[4] This includes the responsibility to respect the right to water and, depending on the constitutional, statutory or contractual provisions in a particular jurisdiction, may involve other duties. The corporate duty to respect the right to water exists independently of the ability or willingness of States to fulfill their own human rights obligations with regard to the right to water.[5] The corporate responsibility to respect the right to water has two significant but related aspects. Firstly, non-State actors have a duty to avoid causing or contributing to adverse human rights impacts through

[1] See United Nations Committee on Economic Social and Cultural Rights *General Comment No 15, Right to Water* (2002) UN Doc E/C.12/2002/11 para 12.
[2] DM Chirwa "Privatisation of Water in Southern Africa: A Human Rights Perspective" (2004) 4 *African Human Rights Law Journal* 218 233.
[3] United Nations Human Rights Council *Report of the Independent Expert on the issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation* (2010) A/HRC/15/31 para 16 (hereinafter referred to as the "Special Rapporteur Report").
[4] See section 5 3 3, chapter 5.
[5] See Principle 26 and Commentary of the United Nations Human Rights Council *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprise: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011) UN Doc A/HRC/17/31 (hereinafter referred to the "UN *Guiding Principles on Business*").

their own activities that impair the right to water.[6] Secondly, non-State actors should seek to prevent or mitigate adverse impacts linked to their operations that infringe on the right to water.[7] The latter includes the provision of grievance mechanisms that allow individuals and groups to bring alleged human rights abuses of the right to water to the attention of the service provider.[8]

It was explained above that privatisation of water services typically exhibits a continuum of possible institutional arrangements.[9] The continuum involves State ownership and management of water services at one end, and private ownership of water services at the other end, while in between are various shades of so-called public-private partnerships.[10] States' privatisation of their traditional domestic functions such as water provision has in some cases weakened regulation at the national level.[11] The weakening of regulation is mainly a result of investor pressure and new international free trade rules and bilateral investment treaties.[12] Furthermore, privatisation experiences from Tanzania, Bolivia, South Africa and the Philippines also noted the lack of independence and expertise of regulatory bodies as one of the failures of some of the water privatisation experiments in those countries.[13] Problems often include lack of political will to create independent and effective regulatory agencies as illustrated in the case of the Philippines and South Africa.[14]

This chapter proposes an accountability model incorporating good practices from different jurisdictions. A number of factors were taken into account in selecting the practices to be discussed. First, I draw on a cross section of jurisdictions from different parts of the world representing diverse legal systems. Second, this chapter also focuses on those practices available in English or where English translations were available. Third, the practices were selected on the basis that they give effect to the values and purposes underpinning water as a human right[15] even though some of them do not explicitly refer to the right to water. A deliberate position was taken to

[6] UN *Guiding Principles on Business* principle 13 (a).
[7] Principle 13 (b).
[8] Para 58.
[9] See section 3 3, chapter 3.
[10] See OA K'Akumu "Privatisation Model for Water Enterprise in Kenya" (2006) 8 *Water Policy* 539 542.
[11] Section 3 5 2 7, chapter 3.
[12] Section 3 5 1 2, chapter 3.
[13] See section 3 5, chapter 3.
[14] See section 3 5 3 & 3 5 2, chapter 3.
[15] See sections 2 2 & 2 3, chapter 2.

use the expression “good practices” rather than “best practices.” Using the term “best practices” would be too ambitious as it gives the impression that a thorough examination of all practices in the world has been done and the best have been selected.[16] Such a task would be impossible given the limited remit of this chapter which is rather to select practices which are illustrative of sound implementation of the right to water in a privatisation context. In illustrating the good practices, I will also highlight and contrast with the “bad practices” that are inconsistent with the normative values and duties imposed by the right to water and should be avoided.

An important prong of the model is the State’s duty to protect against human rights abuses of the right to water by third parties, including corporations, through appropriate policies, regulation and adjudication. The accountability model emphasises the responsibility of water services providers, including non-State actors, to respect the right to water.[17] The duty to respect the right to water has both positive and negative dimensions and this will be illustrated in the elaboration of the accountability model.[18] The duty to respect is broad enough to proscribe the adoption of policies that may result in denial of access by poor communities to safe water, rather than simply prohibiting interference with existing access to water services.[19] It also enjoins the State to prevent, investigate, and punish abuse of the right to water and to provide access to appropriate remedies. The duty to protect means that corporations should act with due diligence to avoid infringing the right, and to address any adverse impacts on the right to water as a result of their actions. Both the State and the non-State actor should, at different stages of the conception and implementation of a privatisation contract, identify groups and individuals who may be significantly affected by the agreement. The State and the non-State actor should pay particular attention to the privatisation initiative’s human rights impact on individuals and groups that may be at heightened risk of vulnerability and marginalisation.[20] The accountability model also emphasises the need for victims to access effective remedies, both judicial and non-judicial. Such effective remedies should be available, both at the State level and at the corporate level. The

[16] A de Albuquerque & V Roaf *On the Right Track: Good Practices in Realising the Rights to Water and Sanitation* (2012) 12.
[17] Special Rapporteur Report para 18.
[18] See section 6 3 , chapter 6.
[19] See section 5 3 3, chapter 5.
[20] See United Nations Human Rights Council *Protect, Respect and Remedy: A Framework for Business and Human Rights* (2008) A/HRC/8/5 (hereinafter referred as “UN Framework”) principle 18.

accountability model is thus an inter-related and dynamic system of preventative and remedial measures involving both the States and corporations through "differentiated but complementary responsibilities."[21] It must be noted that, in terms of the accountability model developed in this chapter, it is impossible to surgically separate the obligations of the State and the responsibilities of a non-State provider. In many respects the State's obligations and the responsibilities of the water services provider overlap and complement each other. I will however attempt to disentangle and highlight the respective obligations of the State and those of the water services provider with respect to the right to water.

The water services provider must comply with the normative content of the right to water discussed above which encompasses both substantive and procedural components.[22] This chapter will focus on how such norms can be implemented in practice by discussing model legislation and good practices from across the world. The previous chapters discussed attempts at international, regional and national levels, firstly to explicitly recognise the right to water, and secondly, the attempt to impose human rights responsibilities on non-State actors in respect of the right to water. The significance of explicitly enshrining a right is to confer on people an entitlement, which States and other actors must respect, protect, promote and fulfill within a framework of law and policy.[23] This is done through clarifying and operationalising such norms. This chapter thus considers good practices in the form of legal frameworks, national policy initiatives, strategies, plans, regulatory systems and institutions employed by States and other actors consistent with the norms imposed by the right to water.

The chapter is divided into two parts. The first part discusses and analyses the procedural elements of the accountability model focusing on the decision whether or not to privatise provision of water services, the terms of a water privatisation contract, and the operation of water services. It also discusses procedural components of the right to water such as consultation, participation, and access to information and how such standards have been implemented in practice. The second part of the chapter discusses the normative content of the right to water focusing on availability, quality and accessibility of water services and how these norms should be operationalised in

[21] See principle 9.
[22] See section 2 6, chapter 2.
[23] de Albuquerque & Roaf *On the Right Track* 45.

practice. This section also explores the importance of regulation and monitoring mechanisms and relevant models from different national jurisdictions. It examines certain frameworks from different jurisdictions with respect to the right to water followed by the conclusion.

6 2 Accountability model: The State duty to protect in the context the privatisation of water services

The State's duty to protect the right to water from interference by third parties was analysed in chapter 4.[24] The State has an obligation to prevent third parties from threatening access to equal, affordable, sufficient, safe and acceptable water.[25] The State may be held liable where it neglects to put in place mechanisms to prevent and address abuse of the right to water by third parties.[26] The State is under an obligation to ensure that the involvement of non-State actors does not result in abuse of the right to water. This obligation entails the State's duty to regulate and control water service providers to prevent the latter from compromising equal, affordable and physical access to water of a good quality.[27] The duty to protect also enjoins the State to grant special protection to vulnerable and disadvantaged groups. States will be able to discharge this obligation by establishing appropriate laws, regulations, as well as monitoring, investigation and accountability mechanisms.[28]

The State is obliged to adopt laws, policies and regulations to protect beneficiaries of the right to water from interference by non-State actors.[29] It must

[24] See section 4 2 2, chapter 4.

[25] The CESCR has explained in General Comment 15 that:

> "Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable and physical access to sufficient, safe and acceptable water." See CESCR *General Comment 15* (2002) para 24.

[26] See section 4 2 2, chapter 4.

[27] United Nations High Commissioner For Human Rights *The Corporation Responsibility to Respect Human Rights: An Interpretive Guide* (2012) HR/PUB/12/02 (hereinafter "UN The Corporate Responsibility to Respect") para 38.

[28] See UN *The Corporate Responsibility to Respect Human Rights* para 5. A State should ensure that it continues to exercise adequate oversight in order to meet its obligation to realise the right to water when it engages non-State actors to manage water services. Should a water privatisation scheme result in the violation of any of the constituent elements of the right to water discussed in chapter 2, the State may be liable for failing to discharge its duty to protect. For a State to effectively discharge its protective mandate particularly where water services have been privatised, it must put in place a regulatory and monitoring mechanism to monitor the performance of water services providers. See section 2 6, chapter 2.

[29] The African Commission has also pointed out that this duty to protect entails "the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that

prevent third parties from polluting water resources, and prevent third parties from extracting water resources in a manner which is not sustainable thereby threatening the availability of water resources for present and future generations.[30] Furthermore, the State has a duty to ensure that remedies are available to victims of violations of the right to water. This section analyses examples of good practices and accountability mechanisms from across the world on the implementation of the right to water. There is, however, a risk that even the best normative frameworks can lead to policies and implementation strategies that are not compliant with the human right to water if they do not explicitly recognise the right. Accordingly, for the purposes of this section, the laws and policies are examined as examples of the type of legislation and implementation and accountability mechanisms that can best support efforts to operationalise the standards imposed by the right to water.

6 2 1 The decision to privatise provision of water services

The decision as to whether or not to privatise water services must take place in the context of a sound overall strategy that stipulates how the State aims to achieve universal access to water. Prior to exploring whether to privatise water services, a local authority must give notice to affected individuals and groups of its intention to do so. This is primarily duty which rests on the relevant organs of State since at this stage a non-State actor is not yet involved. Additionally, the relevant sphere of government must establish a mechanism and programme for community involvement and information dissemination regarding the water privatisation contract before it enters into such an agreement. Furthermore, any decision to privatise the provision of water services to a private corporation must be adopted following a democratic, participatory and transparent process. It is important that participation of all concerned must be active, free and meaningful.[31] The requirements of an inclusionary participatory process are discussed in section 6 3 2 below.

There was no public participation process in the decision to privatise water services in the Cochabamba water privatisation case discussed in chapter 3. Therefore no opportunity was afforded to those affected by the privatisation scheme to provide their views on the proposed privatisation scheme and its impact on their

---

individuals will be able to freely realise their rights and freedoms." See *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 para 46.

[30] See for example section 24 of the Constitution of South Africa (1996).

[31] Special Rapporteur Report para 34.

lives.[32] The decision to privatise was essentially made by the World Bank. The World Bank would only grant approval of loans to upgrade Cochabamba's water network on condition that the City of Cochabamba's public water provider, the Municipal Drinking Water and Sewage Service of Cochabamba, was privatised.[33] In the Dar es Salaam water privatisation the public was kept uninformed during the entire privatisation process.[34] The water privatisation was presented as a *fait accompli* as there were no prior consultations or public deliberations on alternative policy options.[35] The water privatisation documents were deemed so confidential that not even members of parliament had access to them.[36] Rather, the privatisation process was conceived, developed and implemented by national and international technocrats without any public engagement.[37] There is no doubt that this lack of transparency and public participation in the privatisation process made it impossible for the public to determine whether the privatisation process was in the public interest.[38]

Some of the practical issues of public interest in any water privatisation project include the cost of water services. It is important that any water privatisation arrangement should not result in a two-tiered system where investment in water services focuses on the wealthy neighbourhoods at the expense of the poor and marginalised communities. Other issues of public interest in any water privatisation initiative include the quality of water services, the environmental impacts, and the potential closure of public spaces if the privatisation initiative is not properly designed. Such issues must be subjected to meaningful public deliberation. In the Cochabamba privatisation case, for example, the privatisation contract gave the water consortium mandated to operate water services exclusive rights of exploitation over rural water supply sources that had traditionally been under the control of indigenous farmers.[39] This move was one of the major reasons leading to the Cochabamba "water war" discussed in chapter 3. It is therefore important that any

[32] See 3 5 4, chapter 3. See also M McFarland Sanchez-Moreno & T Higgins "No Recourse: Transnational Corporations and the Protection of ECOSOC Rights in Bolivia" (2004) 27 *Fordham International Law Journal* 1663 1747.
[33] 1749.
[34] See section 3 5 1 2, chapter 3.
[35] M Akech *Privatisation and Democracy in East Africa: The Promise of Administrative Law* (2009) 65.
[36] Action Aid *Turning off the Taps: Donor Conditionality and Water Privatisation in Dar es Salaam* (2004)10.
[37] Akech *Privatisation and Democracy* 65.
[38] 66.
[39] See 3 5 4 2, chapter 3.

decision to privatise water services should be subjected to a human rights assessment as discussed in chapter 5.[40]

6 2 2 The bidding process

Once the important decision to privatise water services has been made, the tendering, bidding and contract negotiation processes must be transparent. It is important that the terms of reference and the draft contract be made available for public scrutiny and commentary.[41] This is mainly the responsibility of the State as at this stage a private water service provider is not involved. Significantly, issues such as commercial confidentiality must not imperil the transparency requirements.

Public authorities may be under pressure to accept confidentiality clauses when entering into water privatisation contracts with non-State actors so that information relating to the bidding processes or contractual terms, its value and performance will be exempt from public disclosure. Many of the tendering processes for the privatisation of public utilities such as water have been traditionally carried out on the basis that most, if not all, the information concerning commercial relationships between the public authority and private bidder would remain confidential.[42] This issue is canvassed in section 6 2 4 below where I discuss disclosure of appropriate information relating to the privatisation agreement.

It is important that the tendering and bidding processes be based on accurate information relating to the bidding corporation's technical and financial competencies so as to avoid strategic underbidding.[43] The selection of a private contractor for the provision of water services should not only be determined by the price. Other elements must be considered such as the quality of the service, due diligence, empowerment and training of the employees. In South Africa, for instance, one of the Broad-Based Black Economic Empowerment Act No 53 of 2003 is to establish a legislative framework in order to enable meaningful participation of black people in the South African economy.[44] Corporations bidding for a water privatisation contract should be requested to provide relevant information and documents, possibly by a standard procurement questionnaire to facilitate the selection process. Contractual

[40] See section 5 3 3 1, chapter 5.
[41] Special Rapporteur Report para 36.
[42] Information Commissioner's Office *Freedom of Information Act Awareness Guidance No 5: Commercial Interests* 1 available < www.ico.gov.uk> (accessed 17.09.2012).
[43] Special Rapporteur Report para 36.
[44] See section 2 of the Broad-Based Black Economic Empowerment Act No 53 of 2003.

processes between State entities and private water corporations are often characterised by secretive bidding processes as illustrated in the Dar es Salaam and Cochabamba water privatisation processes.[45] Such a practice should be avoided to ensure transparency in the privatisation process.

The information and documents to be requested should provide information on the ownership and, if applicable, the structure of subsidiary corporations. Other relevant information could include documents on the financial situation of the bidding corporation. Such information should include financial statements of overall turnover and profits over the preceding few years, audited accounts and proof of adequate liability insurance. Additionally, the bidding corporation should also provide information on the qualifications, skills and expertise of its management. The corporation should also be asked to provide information on any contracts relating to the provision of water services provided in the last few years as well as on concessions awarded for the provision of water services similar to the one applied for.[46] The above information will help the State in assessing the technical, financial and social suitability of the corporation to operate and manage water services in a way that is compatible with the right to water. The above processes are important from a human rights perspective as any instrument delegating service provision, including privatisation contracts for water services, must comply with human rights standards. The requirement to disclose the above information is consistent with the right to water in which access to information relating to water issues is an integral component of the right to water. The CESCR elaborated that this right includes "the right to seek, receive and impart information on water issues."[47] It is important that the above information be provided to all stakeholders affected by the privatisation process to assist them in the decision-making processes affecting their right to water. Such information will help local authorities and communities to assess the bidding corporation's financial and technical capacity to manage the water services in a way that is compatible with the community's enjoyment of the right to water.[48] The respective obligations and duties of the State and water services providers are discussed in section 6 2 4 below.

[45] See chapter 3.
[46] M Cottier "Elements for Contracting and Regulating Private Security and Military Companies" (2008) 88 *International Review of the Red Cross* 637 641.
[47] CESCR *General Comment 15* (2002) para 12 (iv).
[48] Para 48.

Such information may also be helpful to the State in its selection process and the eventual awarding of a water privatisation agreement. In the security services sector, for instance, the Sarajevo Client Guidelines for the Procurement of Private Security Companies contain systematic procedures facilitating the assessment of tenders for the provision of security services.[49] Such elements include personnel standards, contract management, implementation and reporting standards.[50] The procedure, if suitably adapted for the context of water delivery, provides a useful template for assessing the information provided by corporations tendering for water services provision.

6 2 3 Contract negotiations

One of the challenges with water privatisation is the problem of strategic underbidding as reflected in the Dar es Salaam water privatisation process discussed above. Budds and McGranahan point out that water corporations often purposely submit bids which reflect amounts less than that required to implement a contract.[51] Private contractors may sometimes intentionally underbid in order to win contracts, artificially lowering costs and securing more favourable terms in subsequent renegotiations of contracts.[52] The intention would be to renegotiate the contract for a higher price once the bid has been accepted. Such practices often lead to higher costs for individual users of water services, and thus conflict with the principle of affordability of water services.[53] The Special Rapporteur on the right to water and sanitation (hereinafter referred to as the "Special Rapporteur") has explained that renegotiations are not generally a problem from a human rights perspective.[54] Changes in the operating circumstances and new information may require that the privatisation contract be adapted or amended.[55] Renegotiations may also be necessary to adapt contracts to human rights requirements imposed by the right to water. The problem is where contract renegotiations are the result of strategic underbidding by water corporations seeking more favourable terms, this often leads

[49] South Eastern and Eastern Europe Small Arms and Light Weapons Control *The Sarajevo Client Guidelines for the Procurement of Private Security Companies* (2006) <http://www.isn.ethz.ch/isn/> (accessed 16.07.2012) (hereinafter "Sarajevo Client Guidelines").
[50] See Sarajevo Client Guidelines.
[51] J Budds & G McGranahan "Are the Debates on Water Privatisation Missing the Point? Experiences from Africa, Asia and Latin America" (2003) 15 *Environment & Urbanisation* 87 99.
[52] See de Albuquerque & Roaf *On Right Track* 203.
[53] 203.
[54] Special Rapporteur Report para 36.
[55] Para 36.

to tariff increases and delays or decreases in investment obligations undertaken by corporations.[56]

In the Dar es Salaam water privatisation case, the private operator made a number of attempts to renegotiate the contract and submitted an unsuccessful request for an increase in the company's revenues under the contract. This included an attempt to renegotiate the terms of the privatisation contract as a whole.[57] Internal communications at the private water services provider, City Water, publicised during the arbitration hearing showed fairly desperate attempts by the latter's senior management to force the Tanzanian government to renegotiate the contract. For example, an email communication by a senior manager stated that if City Water did not get the tariff increased, it would "try to force the government's hand" by among other things, stopping payments of contract fees and retrenching City Water's staff.[58] In South Africa, the private water provider which won the water concession contract, Siza Water, assumed responsibility for providing water and sanitation services to what was then known as the Borough of Dolphin Coast, a locality in the iLembe District Municipality.[59] The privatisation agreement had to be renegotiated in 2001 at the instance of the private operator. The renegotiation resulted in a substantial reduction in both the investment requirements for the private entity and the provision of free basic water.[60] It is noteworthy that the renegotiation of the contract was due to lack of profits, with research showing that the private entity regularly cut off services to poor people. In 2001, the private operator experienced financial problems. This resulted in Siza Water failing to pay the scheduled R3.6m lease payment due to the local municipality. The corporation successfully demanded a re-negotiation of the contract in its favour and asked for relief under the contract, which allows for re-negotiation if returns are either above or below a predetermined range.[61] The local authority approved a revised contract in May 2001. In terms of the revised contract, water prices were immediately increased by 15% to restore profitability and the water

[56] Para 36.
[57] F Aldston "Biwater v Tanzania: Do Corporations Have Human Rights and Sustainable Development Obligations?" (2010) 18 *Environmental Liability* 58 62.
[58] *Biwater Gauff (Tanzania)Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22 paras 149 and 123.
[59] For a discussion see section 3 5 2 5 2, chapter 3.
[60] See chapter 3 section 3 5 2 5 2 above.
[61] D Hall & E Lobina "Profitability and the Poor: Corporate Strategies, Innovation and Sustainability" (2007) 18 *Geoforum* 772 778.

corporation's investment commitment was reduced from R25m to R10m over five years.[62]

In the Manila water privatisation discussed in chapter 3, the two privatisation concessions were awarded through international competitive bidding, which was regarded as a model of success at the time.[63] However, a 2003 study by Water Aid indicated that both the consortia appeared to have made particularly low bids, perhaps on the assumption that the terms of the contract would be renegotiated once it was won.[64] Water Aid's study notes the following:

> "The two companies submitted bids for high service qualities at a low price, and then once the contract was signed, tried to re-negotiate, to chisel down quality, to scale down and postpone targets, and to exploit the loosely defined regulatory rules for price adjustments."[65]

Negotiation skills are particularly important, especially on the part of the State. It is therefore important to strengthen the negotiation capacity of local governments thereby reducing power asymmetries. This will help prevent frequent contract renegotiations as a result of deliberate underbidding by corporations to win contracts. Strengthening the negotiating capacity of local authorities helps make certain that the resulting contract pays attention to ensuring that disadvantaged and maginalised communities have equitable access to water services.[66]

6 2 4 The water privatisation contract

This section considers practical issues that arise in the context of contracting water service provision to a private provider. It also discusses contract elements and benchmarks against which to assess the private water provider within the normative framework created by the right to water, including ensuring water availability for every person in sufficient quantities for personal and domestic uses. The privatisation contract must entrench provisions ensuring that water services for domestic use must be free from contamination, are within safe physical reach, and be affordable.[67] The above issues are important to ensure that any privatisation arrangement complies

[62] 778.
[63] See section 3 5 3, chapter 3.
[64] J Esguerra *New Rules, New Roles: Does PSP Benefit the Poor? The Corporate Muddle of Manila's Water Concessions* (2003) 6.
[65] 2.
[66] CESCR *General Comment 15* (2002) para 7.
[67] Para 12.

with the normative content of the right to water, including the duty to ensure that water services are accessible to all members of society without any discrimination.

The human right to water should be protected before and throughout the privatisation contract. This requires continuous assessment by both the State and the non-State provider of whether the measures taken pursuant to the privatisation agreement contribute to the realisation of the right to water.[68] The privatisation contract, as the instrument delegating service provision to a private corporation, must meet human rights standards imposed by the right to water. Although this is primarily a State obligation, non-State service providers have a responsibility to exercise due diligence in this regard.

The affordability of water services is one of the key issues in water privatisation negotiations. The State's obligation to ensure that the right to water is enjoyed by all without discrimination should be kept in mind when negotiating possible tariff structures as part of the privatisation package.[69] Strengthening the negotiating capacity of local authorities will help ensure that any subsequent water tariffs are affordable and do not compromise the realisation of other human rights.[70]

Many of the aspects relating to water privatisation should be regulated by national legislation, instead of terms of contractual negotiations which can leave local authorities without normative guidance, and can place poorer municipalities at a disadvantage in negotiations with more powerful corporate actors. It is vital, taking into consideration the State's duty to protect human rights, that many key criteria and conditions for privatisation are specified through legislation and not left to local government discretions. National legislation should provide normative guidance on such issues such as the technical conditions of existing or proposed extensions of supply; norms and the determination and structure of tariffs; the conditions for payment; the circumstances under which water services may be limited or discontinued; and the procedures for limiting or discontinuing water services.[71] In South Africa, any water privatisation contract should comply with the minimum normative standards provided for in various pieces of legislation. For example, the Water Services Act 108 of 1997 empowers the Minister responsible for water services (hereinafter referred to as "Minister") to prescribe compulsory national

[68] Special Rapporteur Report para 31.
[69] CESCR *General Comment 15* (2002) para 13.
[70] Para 12(c) (ii).
[71] See for example section 4 of South Africa's Water Services Act No 108 of 1997.

standards relating to the provision of water services and the quality of water services.[72] In prescribing such national standards the Minister is enjoined by the Water Services Act to consider issues such as the need for everyone to a reasonable quality of life and the need for equitable access to water services.[73] The Water Services Act also provides procedural requirements that must be complied with whenever a local authority decides to delegate the provision of water services to a private provider. These standards will be considered in section 6 3 6 below in further detail in the context of the discussion of good practices in the privatisation of water services.

The negotiation of water privatisation contracts is an extremely complex task. The water privatisation contract must clearly delineate the responsibilities of the water services provider, allocate risks, set delivery and coverage targets.[74] Water privatisation contracts should comply with any standards and norms provided for under national constitutional and statutory provisions. General Comment 15 provides an important normative standard in the absence of applicable national standards. The privatisation contract should establish complaint mechanisms and specify penalties for non-compliance with the terms of the contract by either party. In this regard, negotiation skills and technical expertise especially on the part of State representatives are crucial. Local governments authorities are often less experienced than large and experienced multinational corporations (hereinafter referred to as "MNCs") in negotiating water privatisation contracts.[75] The asymmetry in negotiating skills may result in the privatisation contract excluding the necessary human rights safeguards imposed by the right to water.[76] It is therefore important to strengthen the negotiation capacity of local authorities. This will help to ensure that the resulting contractual terms comply with the State's international and domestic human rights obligations, including the right to water.

The water privatisation contract is a tool for regulating the private service provider. Despite the private water industry's declared commitment to the right to water through initiatives such as the UN Global Compact CEO Water Mandate, no evidence is publicly available that shows that the human right to water has been

[72] Section 9(1).
[73] Section 9(3).
[74] Special Rapporteur Report para 37.
[75] P Marin *Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries* (2009) 131.
[76] Special Rapporteur Report para 37.

referenced in water privatisation contracts anywhere in the world.[77] This is despite the fact that contracts in other business sectors such as the garment and textile sector, the electronics industry and private security forces are beginning to integrate human rights considerations.[78] Furthermore, corporations are also increasingly interested in integrating human rights risks into purely business oriented contracting processes such as joint ventures, mergers and acquisitions.[79] This makes it important that particular care be given in drafting privatisation contract terms that deal with an essential public good as water. The most direct way of ensuring compliance with international standards in relation to the right to water is national legislation and possibly delegated legislation such as regulations. The privatisation contract itself has an important role to play in ensuring such compliance within the regulatory framework of national and delegated legislation.[80] The capacity of local authorities to craft, negotiate and manage complex water privatisation contracts will determine whether the benefits of water privatisation are realised. Issues such as the need to clearly define responsibilities and allocate risks, set delivery and coverage targets, and establish penalties for non-compliance must be dealt with in the privatisation agreement.[81]

The municipal laws and the regulatory framework of a State hosting an MNC providing water services must lay down conditions corporations must satisfy in order to be allowed to operate within the territory of the State. The CESCR's General

[77] The Institute for Human Rights and Business *More than a Resource Water, Business and Human Rights* (2011) <http://www.ihrb.org/pdf/More_than_a_resource_Water_business_and_human> 34. (accessed 10.09.12)
[78] 34.
[79] 34.
[80] See Special Rapporteur Report paras 22-28. See also the Institute for Human Rights and Business which discusses the water privatisation procedures from a human right to water perspective, starting from the pre-operation phase, the decision to privatise water services, tendering and bidding processes, contract negotiations, the operational phase, and the accountability and review of contracts. See Institute for Human Rights and Business *Water, Business and Human Rights* (2011) 33-36. Chirwa has noted that the formulation and implementation of privatisation policies relating to water should be underpinned by four key human rights principles. The first is the principle of equality and non-discrimination. The second is the indivisibility and interdependence of all rights. The third principle is accountability of both policy-makers and other actors whose actions or omissions have implications for the enjoyment of rights. The fourth principle is the need for participation. According to Chirwa, international human rights law requires that policies must be devised, implemented and monitored in a manner that allows for popular participation. See Chirwa 2004 *Law, Democracy and Development* 189-190. See L A Dickinson "Contract as a Tool for Regulating Private Military Companies" in S Chesterman & C Lehnardt (eds) *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (2007) 51 55. Although the authors discussed the elements of privatisation contracts within the context of private security agreements, the elements they propose as essential ingredients of any private security agreements are equally relevant and applicable in water privatisation agreements.
[81] See Special Rapporteur Report para 37.

Comments have emphasised the importance of national framework legislation with respect to the right to water.[82] The CESCR has explained that existing legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the right to water.[83] South Africa's Local Government: Municipal Systems Act 32 of 2000[84] lays down important procedural requirements for contracting basic municipal services such as water services provision to a private actor. Other relevant pieces of legislation include the Promotion of Access to Information Act 2 of 2000, the Water Services Act 108 of 1997, and the relevant regulations as well as the Promotion of Administrative Justice Act 3 of 2000. This section will refer to the relevant provisions of these respective legislative enactments where they illustrate important aspects of the contracting process.

6 2 4 1 Responsibility of the non-State provider to analyse privatisation contract

The Special Rapporteur has explained that any water privatisation agreement must meet human rights standards.[85] Although this is primarily a State obligation, the Special Rapporteur has also identified responsibilities of non-State actors as part of their due diligence analysis. Non-State actors who are the beneficiaries of a privatisation agreement have a "responsibility to analyse the proposed instrument from a human rights perspective" in order to detect any risks to the right to water.[86] Although non-State actors involved in the provision of water services cannot unilaterally change the terms of the water privatisation agreement, they are nevertheless expected to avoid complicity in human rights abuses. They should not enter into a privatisation agreement which appears likely to result in the infringement of the right to water and other human rights.[87] In this regard, non-State actors have a positive duty to engage proactively with the State to identify and address human rights concerns in respect of the right to water during contractual negotiations.[88]

The privatisation contract should specify the water coverage to be achieved in the designated areas and the service levels that must be met.[89] It should include clear goals, such as the targets to be reached, investment levels, and pricing

[82] CESCR *General Comment 15* (2002) para 45.
[83] Para 46.
[84] Local Government: Municipal Systems Act No 32 of 2000.
[85] Special Rapporteur Report para 38.
[86] Para 38.
[87] Para 38.
[88] Para 38.
[89] Para 40.

arrangements.[90] The privatisation contract must explicitly provide that the water services provider and its employees comply with the legislation of the host State as well as all applicable international law, including the right to water. It should oblige the non-State actor to comply with relevant constitutional and international human rights obligations binding on the host State. Such a provision would avoid the uncertainty as to whether the non-State actor is bound by the obligations attaching to the human right to water.[91] It is however possible that a host State may not have entrenched the standards relating to the right to water in its domestic law. In a situation such as this, it is advisable that the privatisation contract explicitly incorporate international human rights norms imposed by the right to water. Incorporating the human rights norms imposed by the right to water in the privatisation contract will also avoid doctrinal issues and debates on whether particular international human rights norms are binding on non-State actors.

6 2 4 2 Contractual stabilisation clauses

MNCs making long-term, high value investments often emphasise the need to achieve the highest possible degree of legal predictability and investment stability before they commit themselves to investing in host countries. This is the case where there is a risk of arbitrary changes in law and regulation that may compromise their investments. Stabilisation clauses are normally incorporated in investment agreements, particularly Bilateral Investment Treaties (hereinafter referred to as "BITs") between the home State of corporations and the investment host State. Stabilisation clauses are aimed at insulating corporations from changes in laws of the host State, and the consequences of such changes to their investments. The United Nations High Commissioner for Human Rights has proposed principles for responsible contracting that are relevant to water privatisation arrangements.[92]

The incorporation of a stabilisation clause in a water privatisation contract may have a deterrent effect on the regulatory powers of the host State in several ways. The host State may be unwilling to pass domestic legislation implementing the human right to water or to apply such laws to water services in order to avoid paying

[90] Para 40.
[91] Cottier 2008 *International Review of the Red Cross* 643.

[92] See United Nations High Commissioner for Human Rights *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012) HR/PUB/12/02 paras 27-29.

compensation to investors.[93] Furthermore, States may impose less effective human rights and other standards on water privatisation projects in order to avoid infringing stabilisation clauses in water privatisation contracts.[94]

The incorporation of a stabilisation clause into a water privatisation contract is particularly problematic when the host State is a developing country.[95] Developing States often rely on external funding for improving their water infrastructure as shown in chapter 3. As a result, their negotiating power when agreeing to loans for upgrading water infrastructure may be weaker than that of investors and related financial institutions funding the privatisation project.[96] Significantly, many developing States' legal systems may not be sufficiently developed so as to allow proper implementation of their international obligations imposed by human rights such as the right to water. These States may need to pass new laws and regulations to bring their legal systems into full compliance with standards imposed by the right to water.[97] The long-term nature of water privatisation contracts that are subject to stabilisation clauses makes it imperative that the host State retains regulatory flexibility to protect the population in line with international human rights standards imposed by the human right to water.[98] Any protections for the private water provider against any future changes in law should not interfere with the State's *bona fide* efforts to implement laws, regulations or policies in a non-discriminatory manner in order to realise the right to water.[99] The following section will discuss the procedural components of the right to water as well as a discussion of the good practices from different jurisdictions.

[93] See *Human Rights and Business Dilemmas Forum* <http://human-rights.unglobalcompact.org/dilemmas> (accessed 18.09.2012) (hereinafter "*Human Rights and Business Dilemmas Forum"*.
[94] See *Human Rights and Business Dilemmas Forum*.
[95] See *Human Rights and Business Dilemmas Forum*.
[96] See *Human Rights and Business Dilemmas Forum*.
[97] See *Human Rights and Business Dilemmas Forum*.
[98] See *Human Rights and Business Dilemmas Forum*.
[99] UN *The Corporate Responsibility to Respect Human Rights* para 29.

6 3 Procedural obligations imposed by the right to water

6 3 1 Human rights due diligence in respect of the right to water

The importance of "human rights due diligence" or "impact assessments" was discussed in chapter 5.[100] The State and the water services provider have a responsibility to undertake these assessments so as to accurately detect the actual and potential impact of their policies or actions on the right to water.[101] In this respect they should investigate and measure the impact of policies, programmes, projects, and interventions on the right to water and other related human rights.[102] The Special Rapporteur has recommended that, in a water privatisation scenario, the decision to privatise water services should be preceded by an *ex ante* assessment that carefully considers the potential impact of privatisation of water services on the right to water.[103] This is clearly a State obligation given that in most cases a private provider is not involved at this stage. Human rights impact assessments should also be carried out over the duration of the contract as they may forestall actual and potential abuses of the human right to water.[104] The carrying out of human rights assessments during the life of a privatisation contract is both the responsibility of the State and the water services provider. It is important for the State to incorporate into the privatisation contract, or adopt legislation that imposes on the water services provider the obligation to carry out a human rights impact assessment.[105] The assessment must take into account the substantive and normative standards imposed by the right to water.[106]

The international non-governmental organisation, *Rights & Democracy*, has established a model for human rights compliant impact assessments for the private provision of water services. Firstly, any water privatisation project should be underpinned by an understanding of the indivisibility of the human right to water and other economic, social, civil, cultural and political rights.[107] Secondly, the human

[100] See section 5 3 3 1, chapter 5.
[101] Special Rapporteur Report para 44.
[102] S Bakker *et al* "Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)" (2009) 1 *Journal of Human Rights Practice* 436 436.
[103] See Special Rapporteur Report para 43.
[104] Chirwa 2006 *South African Journal of Human Rights* 96.
[105] Para 44.
[106] Para 45.
[107] See Rights and Democracy *Human Rights Impact Assessments for Foreign Investment Projects: Learning from Experiences in The Philippines, Tibet, the Democratic Republic of Congo, Argentina and Peru* (2007) 17.

rights impact assessment of any water privatisation project should give equal attention to the ability of affected groups to participate meaningfully in the water privatisation project and equally express dissent in relation to the project.[108] This, in turn, requires the affected individuals and community's enjoyment of freedom of expression and opinion, security of the person, and the right to privacy. Thirdly, any credible human rights impact assessment should be transparent in both process and content. This entails the human right to seek and receive information.[109] Fourthly, any human rights impact assessment of a water project should be based on non-discrimination and must give special attention to policies and practices that do not result in discriminatory outcomes.[110] This requires the identification of individuals and groups most vulnerable to the water privatisation project and the incorporation of specific steps aimed at their protection and empowerment. Such steps might include designing an impact assessment tool that facilitates meaningful participation by the affected communities in the human rights impact assessment process.[111] This and other procedural aspects of the human rights impact assessment are discussed below.

6 3 2 Consultation and participation with communities affected by the water privatisation agreement

The right of individuals and groups to be consulted and participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water.[112] Involvement of affected communities is important for identifying the most appropriate investments and strategies for the realisation of the right to water. A thorough understanding of the actual condition of water services is a prerequisite in order to establish effective strategies and policies. An accurate assessment of the current situation, data and water sources available requires the involvement of affected communities. All those affected by a privatisation policy, particularly the poor and the marginalised sections of the community, must be given the opportunity to participate and give input in key decisions relating to water services.[113]

---

[108] 17.
[109] 16.
[110] 16.
[111] 16-17.
[112] CESCR *General Comment 15* (2002) para 48.
[113] Special Rapporteur Report para 34.

International human rights law emphasises the need for policies to be conceived and implemented in a manner that allows for public consultation and participation.[114] The UN Declaration on the Rights of Indigenous Peoples, for instance, provides that States must obtain indigenous peoples' "free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[115] The Indigenous and Tribal Peoples Convention further provides for the rights of indigenous peoples to their lands to be specially safeguarded.[116] Such rights "include the right of these peoples to participate in the use, management and conservation of their resources."[117] The UN Human Rights Council has emphasised the importance of consultation and participation of communities and other stakeholders affected by any project as reflected in the UN Guiding Principles and the Special Rapporteur's report.[118] The CESCR has particularly emphasised the significance of public consultation and participation in decision-making must be an integral part of any policy, programme or strategy concerning water issues, including privatisation of water services.[119] Public consultation and participation must apply at different levels and stages of the process. This should include participation in the formulation of relevant legislation relating to water services as such legislation will govern the privatisation process.

6 3 2 1 Public consultation and participation: State obligations

The State must consult and ensure participation of communities at different stages of the process. Such consultation and participation should be intergral to the adoption of framework legislation governing water services, the decision whether or not to privatise water services, as well as the privatisation process. The State must ensure that public consultation and participation process is free of external manipulation, interference, coercion, or intimidation and must enable meaningful participation by the community.[120] Furthermore, such participatory processes should be conducted in such a way that fully reflects the different concerns of both men and women. This

[114] DM Chirwa "Privatisation of Water in Southern Africa: A Human Rights Perspective" (2004) 4 *African Human Rights Law Journal* 218 234.
[115] See United Nations *Declaration on the Rights of Indigenous People* (2007) UN Doc A/RES/47/1 article 19.
[116] International Labour Organisation *Indigenous and Tribal Peoples Convention* (1989).
[117] Article 15(1).
[118] See also Special Rapporteur report, para 34 and the UN *Guiding Principles* principle 18.
[119] See CESCR *General Comment 15* (2002) para 48.
[120] See International Finance Corporation *Performance Standards on Environmental and Social Sustainability* <http://www1.ifc.org/wps> (accessed 06.07.2012) para 30.

may be done through separate forums for males and females. The State must also ensure that the community consultation process is sensitive to the language preferences of the communities, their decision-making processes, and the needs of disadvantaged or vulnerable groups.[121] The State should document the entire consultation process and propose measures to avoid or minimise risks to and adverse impacts on the community and advise the community on the measures taken to ameliorate the latter's concerns.[122] Furthermore, such community representatives should be relied upon to faithfully communicate the results of consultations to the community.[123]

McFarland Sanchez-Moreno and Higgins point out that few opportunities for public input were provided to the public during the privatisation process.[124] The government made no effort to communicate and disseminate information to the public, particularly those mostly affected, such as indigenous farmers. The government proceeded to pass "the new water law in a hurried and deceptive manner, again undermining public participation."[125] In the Dar es Salaam water privatisation case, the decision to privatise was made a condition of the funding availed to Tanzania by the World Bank. In terms of the loan agreement, Tanzania was obliged to appoint a private operator to manage and operate the water and sewerage system. No public input was ever sought on the decision to privatise Dar es Salaam water provision.[126]

Brazil's 2007 Basic Water and Sanitation Law 11445 of 2007 (hereinafter referred to as "Law 11 445"),[127] developed through a multi-stakeholder process, underscores the importance of participation to achieve the goal of universal access to water services, with a focus on marginalised groups and those living in poverty. The Bill of Law 11 445 was finalised at the first Conference of the Cities in 2003, a national process of debates including conferences in the municipalities and states.[128] The legal basis for this process is contained in the *Estatuto da Cidade* (City Statute) Law 10 257 of 2001 (hereinafter referred to as "Law 10 257 of 2001"). Law 10 257

[121] Para 30.
[122] Para 31.
[123] Para 27.
[124] 1747.
[125] 1747.
[126] *Biwater v Tanzania* para 3.
[127] Basic Water and Sanitation Law 11 445 of 2007.
[128] Centre on Housing Rights and Evictions *Case Studies on Efforts to Implement the Right to Water and Sanitation in Urban Areas: Brazil, Kenya, Sri Lanka and South Africa* (2008) 9.

considers local and national conferences as tools for achieving the democratic administration of cities through a participatory framework.[129] Launched in 2003, the consultation process for Law 11 445 involved 320 000 citizens and 3457 conferences.[130] Law 11 445 was subsequently approved by an inter-ministerial working and the *Conselho das Cidades* (Council of the Cities), the representative body of the conference system created in 2004. This multi-stakeholder body was set up to discuss and make decisions on urban issues, including the allocation and use of water resources.[131] The draft law was also reviewed by legal academics.[132] Law 11 445 provides that, in order to receive funds from the central government, each municipality needs to develop a fully articulated plan, including data collection and monitoring processes. Furthermore, the law reiterates that water services providers, both public and private, are responsible for delivering services to all persons living in urban areas, including marginalised communities living in informal settlements. Significantly, the law mandates extensive public participation in decision-making processes through the Council of Cities.[133]

6 3 2 2 Public consultation and participation: Responsibilities of the water services provider

The corporation should engage with the communities affected by the water privatisation contract as part of its human rights due diligence as early as possible in the life of a privatisation project.[134] The public consultation and participation should enable ongoing processes of interaction and dialogue between the private operator and the community affected by the privatisation arrangement. It is suggested that the corporation must conduct a human rights impact assessment even before the contract has been awarded in order to properly cost the implementation of the project in the bidding process. This will also enable the water services provider to obtain an accurate socio-economic profile of the community, so as to inform the water services

[129] 9.
[130] 9.
[131] 9.
[132] 9.
[133] See UN Human Rights Council *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque: Compilation of Good Practices* (2011) A/HRC/18/33/Add.1 para 14.
[134] Hepple has also explained that "structured engagement with those affected before decisions are taken, provides a more effective means of advancing participation in decisions about, and the implementation of socio-economic policies" B Hepple "Negotiating Social Change in the Shadow of the Law" 2012 (129) *South African Law Journal* 248 261.

provider as to what water services they can afford, and therefore what subsidies might be required. This information would, in turn, need to be factored into the contract negotiations.

The corporation must again conduct a human rights impact assessment once the contract has been awarded, but before implementation of the contract. This would enable the corporation to hear, understand and respond to community interests and concerns on the operation of water services, including through collaborative approaches.[135] Such an assessment is not a substitute but rather complements the impact assessment carried out by the State on the decision on whether or not to privatise water services. A sound practice would be for the State and the water services provider to work together after the award of the contract to integrate human rights norms into water policies thereby ensuring compliance with the standards imposed by the right to water.[136]

Full and meaningful public consultation and participation is one of the defining tenets of the human rights framework and must be a central component of any water privatisation initiative. When communities are subject to identified risks and adverse impacts from the water privatisation project such as evictions, for instance, the private water provider must also undertake a process of consultation.[137] It is important for the water services provider to develop and implement a community consultation and participation plan. Issues that can be discussed and agreed upon during the consultation process include the sufficiency, quantity, water quality, regularity of supply, the accessibility, as well as the affordability of water services.

The corporation's consultation with communities affected by the water privatisation agreement provides important insights into their perspectives and concerns regarding the corporation's operations and the implications these have for their human right to water and related rights.[138] Significantly, such consultation can also help to ensure that human rights concerns relating to the right to water are

---

[135] UN *The Corporate Responsibility to Respect Human Rights* 8.
[136] Special Rapporteur Report para 44.
[137] The United Nations Sub-Commission Guidelines also provide that:
> "Everyone has the right to participate in decision-making processes that affect their right to water and sanitation...[c]ommunities have the right to determine what type of water and sanitation services they require and how those services should be managed and, where possible, to choose and manage their own services with assistance from the State." See UN Sub-Commission *Report of the Special Rapporteur, El Hadji Guissé* (2005) E/CN.4/Sub.2/2005/25 para 8.

[138] Special Rapporteur Report para 44.

mainstreamed in the privatisation project.[139] This can help to build trust and make it easier to find ways to address any potential and existing impacts on the community. The water services provider must also ensure that the consultation and participation of affected communities is carried out with particular sensitivity to cultural differences and any perceived power imbalances.[140]

The International Finance Corporation's Performance Standards on Environmental and Social Sustainability of 2012 emphasise the importance of a corporation's consultation with communities affected by an investment project and the steps that must be taken.[141] Consultation with the affected community is essential for managing the impact of a water privatisation agreement. Disadvantaged communities such as indigenous peoples are particularly vulnerable to the loss and exploitation of traditional water sources, land and access to natural and cultural resources. This was clearly the case in the Cochabamba privatisation discussed above.[142]

The water services provider must ensure that it discloses and disseminates information, relating to grievance mechanisms and other relevant data on water issues to enable meaningful participation by the affected communities.[143] The nature, frequency and level of effort of the public consultation and participation may vary considerably and will be commensurate with the project's risks and adverse impacts and the project's phase of development.[144] The International Finance Corporation's Performance Standards on Environmental and Social Sustainability emphasise the importance of participation of all stakeholders affected by World-Bank funded

---

[139] Para 44.
[140] Para 44.
[141] See IFC *Performance Standards on Environmental and Social Sustainability* (2012) Performance Standard 1 <http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/> (accessed 06.07.2012).
[142] See section 3 5 4, chapter 3.
[143] See IFC *Assessment and Management of Environmental and Social Risks and Impacts: Performance Standard 1* para 25. Albuquerque has explained that all projects aimed at improving access to water, including privatisation initiatives, must be based on principles of participation, accountability and transparency. Individuals and groups have a right to participate in decision-making processes that may affect their exercise of the right to water. All those affected by a privatisation policy, particularly the poor and the marginalised sections of the community must be given the opportunity to participate and give input in key decisions directly or indirectly affecting their socio-economic rights. Access to a participatory process must be facilitated for all stakeholders affected by a decision, including those who lack social status, and who are stigmatised in the community or who may require particular accommodations to fully participate. This consequently entails a right of access to sufficient, adequate and timely information pertaining to the proposed privatisation process. See de Albuquerque & Roaf *On the Right Track* 31. See also DM Chirwa "Water Privatisation and Socio-Economic Rights in South Africa" (2004) 8 *Law, Democracy and Development* 181 185-186.
[144] Special Rapporteur Report para 25.

projects.[145] The principles contained therein provide a useful template and are equally relevant given that the bulk of water privatisation projects frequently tend to have World Bank funding.

6 3 3 Public consultation and participation: Good practices in comparative and international law

Examples abound in the water and other development sectors where lack of participation of project beneficiaries has led to the implementation of projects that do not fulfill people's needs, often resulting in the collapse of such initiatives.[146] In the case of Nkonkobe water privatisation case discussed in chapter 3,[147] the water privatisation contract with Water Services South Africa (Pty) Ltd was nullified by the then Grahamstown High Court in South Africa. The Nkonkobe municipality won a court battle to nullify a six year-old water privatisation contract.[148]

The Nkonkobe municipality argued that the provisions of section 173(4) (a) and (b) of the Municipal Ordinance No 20 of 1974 (hereinafter referred to as the "Ordinance")[149] were not complied with at the time the water privatisation contract was entered into hence the agreement was *ultra vires* and therefore invalid.[150] Section 173(1) of the Ordinance empowered a local authority to enter into contracts with third parties. The Ordinance, however, provided that no such contract shall come into force until the Council has given notice of its intention to enter into such a contract through publishing a formal notice in the press.[151] Furthermore, such a contract had to be approved by a Member of the Executive Council of the relevant province.[152] The Ordinance also provided details on the publication procedure in a schedule. This included publication of the notice in a newspaper setting forth the details of the envisaged contract and specifying the place and hours during which particulars thereof would be available for inspection.[153] The Ordinance also provided for the publication of a copy of the notice at the municipal office and that such copy

---

[145] See IFC *Performance Standards on Environmental and Social Sustainability*:*Performance Standard* 1**.**
[146] WASH et al *The Human Right to Safe Drinking* 256.
[147] See section 3 5 2 5 1, chapter 3.
[148] *Nkonkobe Municipality v Water Services SA (Pty) Ltd* 2001 ZAECHC 3.
[149] Municipal Ordinance No 20 of 1974.
[150] *Nkonkobe Municipality v Water Services SA* 5.
[151] See section 173(4) of the Ordinance.
[152] See section 173(4)(b).
[153] Section 2(LXXvii) of Schedule to the Ordinance.

had to be displayed for a period of not less than 21 days from the day on which the notice was so published.[154]

The court eventually nullified the contract on the basis that the municipality did not comply with the notice requirements in the Ordinance.[155] Such irregularities came to light following protest and campaigning from civil society organisations. The court ruled that the contract was invalid as it had not been published first for comment by members of the public.[156] Furthermore, the approval of the local government's Member of the Executive Council was never obtained as statutorily required.[157]

The court explained that the publication requirement was for the benefit of ratepayers on whose behalf a local authority intends contracting with other entities for the purpose of municipal functions.[158] The court further elaborated that the rights and interests of affected communities could be affected in a very real sense by such a contract entered into by their local authority.[159] The court stated that the community's rights and interests be protected especially where such contract relates to the privatisation of an essential service such as provision of water services.[160]

The court further ruled that it was in the interests of the affected community in ensuring compliance with the provisions of section 173(4) of the Ordinance.[161] The publication requirement would have enabled the community to assess whether the contract entered was indeed for the benefit of the inhabitants of the municipal area.[162] It would also have helped the community to ascertain whether the party contracting to provide water services was competent to do so. Furthermore, publication would have helped the community to assess whether the terms of such a contract were not financially burdensome to the local authority which would make it unable to meet its obligations under the contract.[163]

The Indigenous Peoples Convention also enjoins States to establish or maintain procedures through which to consult indigenous peoples before undertaking or permitting any programmes for the exploration or exploitation of their lands.[164] The

---

[154] Section 2(LXXvii).
[155] 15.
[156] *Nkonkobe Municipality v Water Services SA* 7.
[157] 15-18.
[158] 7.
[159] 7.
[160] 7.
[161] 17.
[162] 17.
[163] 17.
[164] International Labour Organisation Indigenous and Tribal Peoples Convention (1989) article 15(2).

purpose of the consultation process is to ascertain whether, and to what degree, indigenous peoples' interests would be prejudiced, before undertaking or permitting any programmes for the exploitation of resources on their lands.[165] It is also important that indigenous peoples participate in, and benefit from, any activities on their land. This includes, receiving appropriate reparations for any damages which they may sustain as a result of such activities.[166] Consultation with and participation of indigenous peoples is particularly important where any water privatisation arrangement may result in interference with customary or traditional arrangements for water allocation.[167] In the Cochabamba privatisation discussed in chapter 3, Law 2029 allowed the possibility of charging indigenous people who drew water from the concession area.[168] Law 2029 deemed all water resources, including those from land owned by indigenous communities in the country the original property of the State.[169] Law 2029 was passed with little debate and no deliberative process to consult indigenous people was carried out.

Any water privatisation project must give special attention to the relationship between indigenous people and their land.[170] A local authority or entity should consult with, and ensure participation of, indigenous peoples when making significant decisions such as water privatisation with respect to land belonging to such communities. The local authority and the water services provider must consider ways of fostering indigenous community's capacity to participate in such decision making.

The mechanism established under the Niger Basin Water Charter provides another form of consultation and participation by all stakeholders on water related decision-making.[171] The Niger Basin Water Charter provides for the rights of all stakeholders to participate in the development and implementation of decisions

[165] Article 15(1).
[166] Article 15(2).
[167] CESCR *General Comment 15* (2002) para 21.
[168] McFarland Sanchez-Moreno & Higgins 2003-2004 *Fordham International Law Journal* 1663 1171.
[169] 1771.
[170] 1771.
[171] The Niger River Basin is a large catchment area with significant water resources cutting across at least nine countries and a population of approximately 100 million people. The Niger Basin Authority is an intergovernmental organisation in West Africa established in 1980 and aims to foster co-operation in managing and developing the resources of Niger river basin. The Niger Basin Authority is composed of nine nations, namely Benin, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Guinea, Mali, Niger and Nigeria. The Niger Basin Authority defines its purpose as the promotion of cooperation among member countries to ensure integrated development of resources of the River Niger.The Member States of the Niger Basin Authority adopted the Niger Basin Water Charter that came into force in July 19, 2010 which is also dedicated to address the right of access to water among other objectives. The Niger Basin Water Charter is aimed at developing a cooperation based on solidarity and reciprocity on use of the water resources of the Niger river basin.

relating to the exploitation of water resources in the basin.[172] The Niger Basin Water Charter further provides for parties to be furnished with information on the "status of transboundary waters, water allocation to different sectors and measures taken or projected to prevent, manage and reduce the transboundary impact."[173] According to the Niger Basin Water Charter, information must be made available early in the decision making process.[174] Additionally, reasonable deadlines must be scheduled concerning the different stages of public participation. Furthermore, participation should start early in the proceedings. The public must be informed promptly in case of new projects.[175] The public must have the opportunity to submit written comments, such as all observations, information, suggestions, propositions, counter-propositions, analysis or opinions that they find pertinent.[176] The Niger Basin Water Charter further provides that the authority shall ensure that, at the point of decision-making, the results of public participation are duly taken into account. Significantly, the authorities are enjoined to ensure that the public is promptly informed once the decision relating to water services has been made.[177] It necessarily follows that any water privatisation project earmarked for any area of the Niger Basin should be preceded by public consultation and participation as provided by the Niger Basin Water Charter.

Pakistan's National Drinking Water Policy of 2009 specifically provides for the participation of women in planning, implementation, monitoring, operation and maintenance of water services given their role in the provision of domestic waters supply.[178] This is meant to promote community ownership, empowerment as well as sustainability.[179] The National Water Drinking Policy further provides for special focus to be placed on gender training programs for the staff of water supply related

[172] See article 25 of the Niger Basin Water Charter (2008). Translated and reported in WASH United, Freshwater Action Network (FAN Global) & WaterLex *The Human Right to Safe Drinking Water and Sanitation in Law and Policy – a Sourcebook Laws and Policies Guaranteeing the Human right to Drinking Water and Sanitation at the National, Regional and International Levels* (2012) 97.
[173] Article 26.
[174] Article 26.
[175] Article 26
[176] Article 26
[177] Article 26. See also Paraguay's Law 3239 on Water Resources which provides that "[t]he management of water resources must take place in the framework of sustainable development, must be decentralised, participative and have a gender perspective." See article 3 of the Law 3239 on Water Resources of 10 July 1997. Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 256.
[178] See article 4 (iv) of the *National Drinking Water Policy* (2009). Translated and reported in WASH et al *The Human Right to Safe Drinking* 258.
[179] Article 6.5 (i).

institutions at all levels. This will help to effectively respond in a sensitive manner to gender differentiated needs in the water services sector.[180]

In Australia, the Independent Competition and Regulatory Commission (hereinafter referred to as the "ICRC") is a statutory body set up to regulate prices, ensure access to public services, and handle complaints and other matters in relation to regulated industries such as water.[181] The ICRC has the further responsibility of licensing utility services and ensuring compliance with license conditions. Australia's Utilities Act Chapter 27 of 2000 (hereinafter referred to as the "Utilities Act") enjoins the ICRC to consult with the public on issues relating to public utilities such as water. For instance, before the ICRC makes a licensing decision, it is obliged to invite submissions about the matter from interested people.[182] The Utilities Act also provides for public notice to be published in a daily newspaper and on ICRC's web site, on the internet, and state where copies of relevant documents may be inspected.[183] The public notice must state where submissions may be lodged and the closing date for submissions which must be at least 28 days after the day the notice is published.[184] Furthermore, the Utilities Act provides that if the ICRC gives public notice about a licence decision, it must not make the decision unless the utility has considered the matters raised in all public submissions.[185] The Utilities Act further provides that the ICRC must make copies of each of the documents relevant to its licensing decisions available for public inspection.[186] The Act entitles any person, without charge, to inspect a document made available and make a copy of all or any part of the document in the possession of the ICRC.[187]

India's National Water Policy of 2009 also emphasises the need for a participatory approach.[188] It states that a water services provider should follow a participatory approach in the design and operation of the service. The National Water Policy further states that such an approach should involve water users and other stakeholders in various aspects of planning, design, development and management

[180] Article 6.5 (iv).
[181] See The Independent Competition and Regulatory Commission <http://www.icrc.act.gov.au/> (accessed 22.08.2012).
[182] Section 36(1) of the Utilities Act of 2000.
[183] Section 36(2).
[184] Section 36(2).
[185] Section 36(3).
[186] Section 53(1).
[187] Section 53(3).
[188] National Water Policy (2009) para 9 <http://www.environment.gov.pk/NEP/DWPolicyOct2009.pdf> (accessed 26.07.2012).

of water resources projects.[189] The National Water Policy further states that necessary legal and institutional changes should be made at various levels to ensure an appropriate role for women.[190] Kyrgyzstan's Water Code also provides that the management of water resources should be participatory. This means that all interested stakeholders should participate in planning and decision-making processes relating to the provision of water services.[191] The Water Code provides that information on the condition and use of water bodies and water resources should be accessible to the public.[192]

New Zealand's Local Government Act 84 of 2002 (hereinafter referred to as the "Local Government Act")[193] sets a comprehensive procedure to be followed by local authorities when carrying out community consultation processes. A local authority is obliged to provide affected individuals or communities with information to help them present their views to the local authority in a manner that is appropriate to their needs. This might involve providing information in more than one language or in more than one format.[194] The Local Government Act enjoins local authorities to seek out views of people affected by a particular decision.[195] Communities should be informed in detail regarding the purpose and focus of the consultation process.[196] The legislation further requires a local authority to give a reasonable opportunity to affected individuals and communities to present those views to the local authority in a way that is appropriate to the needs of the communities in question.[197] In most cases local authorities may have working plans and strategies in mind before any consultation process. Nevertheless, they must be prepared to listen to and consider all submissions from the affected communities with an open mind.[198] A local authority is also obliged to provide information to affected communities on the decision it has made, and the reasons thereof which led to the particular decision.[199]

---

[189] Para 12.
[190] Para 12.
[191] Article 6 of the Water Code of the Kyrgyz Republic, Law No 8 of 12 January 2005. Translated and reported in WASH et al *The Human Right to Safe Drinking* 258.
[192] Article 26.
[193] See section 82, Local Government Act No 84 of 2002.
[194] Section 82(1)(a).
[195] Section 82(1)(b).
[196] Section 82(1)(c).
[197] Section 82(1)(d).
[198] Section 82(1)(d).
[199] Section 82(1)(f).

In New Zealand, local authorities are further required to put in place mechanisms to specifically consult with the indigenous Maori people.[200] The Local Government Act sets out principles to facilitate substantive participation by Maori in local government decision-making processes. Local authorities should provide Maori with opportunities to contribute to decision-making processes including on issues relating to land and water.[201] The Local Government Act specifically requires local authorities to take into account the relationship of Maori and their culture and traditions with their ancestral land and water when making a significant decision with respect to land and bodies of water.[202]

The problematic aspect with the last provision is that it only requires the local authority to take account the community's views. It does not explicitly require that the views of the community be given sufficient weight and be factored into the decision as to whether or not to proceed with a particular project.[203] It is important that the views of minorities must be given serious consideration especially in water privatisation initiatives directly or indirectly impacting on the welfare of such a group.

6 3 4 Disclosure of appropriate information relating to the privatisation agreement

A credible community consultation and participatory process must be based on the prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information to the affected community. It must be emphasised that the State and the water services providers have the responsibility to disseminate any relevant information in their possession relating to the privatisation arrangement. The affected individuals and community should be given equal access to full and transparent information concerning water issues held by public authorities or third parties. This must be specified in national laws, including provisions on the obligations of governments as well as procedures to secure adequate participation.[204] Factors that influence people's ability to access information need to be taken into account including illiteracy and poverty.[205] People may not understand

[200] Section 82(2).
[201] Section 14 (d). This principle is reinforced in section 82 which requires all local authorities to have processes in place for consulting with Maori.
[202] Section 77 (1) (c).
[203] Section 81 also requires local authorities to establish and maintain processes for Maori to contribute to local decision-making, and to consider ways of fostering Maori capacity to contribute to local decision-making.
[204] Section 32.
[205] Section 32.

the language or the information itself. Information may therefore need to be published in different languages and through multiple media (written, spoken) to ensure that everybody is able to access public information as equitably as possible.[206]

6 3 4 1 State obligation to furnish affected community with information

The normative content of the right to water, as elucidated in chapter 2, enjoins public access to information concerning proposed water policies and actions plans to enable meaningful consultation and participation.[207] The CESCR has elaborated in General Comment 15 that individuals and groups should, in the formulation and implementation of national water strategies and plans, be given full and equal access to information concerning water issues held by public authorities or third parties.[208] The UN Human Rights Council has also explained that genuine participation of communities affected by any proposed decisions on water policies requires disclosure of adequate and sufficient information. In the case of proposed privatisation of water services, the public must have access to draft water privatisation contracts.[209] Access to information includes the right to receive and distribute information concerning water issues.[210]

To make participation possible, the first step is always to ensure that there exists accessible public information pertaining to current and future government policies. As discussed in section 6 3 2 above, the relevant sphere of government, depending on the internal organisation or federal structure of the State, must provide the affected community with access to relevant information relating to the decision to privatise water services and its plans for ensuring universal access to water services. Furthermore, the State should furnish affected communities and individuals with relevant information at the tendering, bidding and contract stages.[211] Disclosure of information will help such stakeholders to understand the proposed benefits, risks, impacts and opportunities of the proposed project.[212] The State should also provide relevant information on the content of those policies, actions plans, budgets and

[206] Section 32.
[207] See section 2 6, chapter 2.
[208] CESCR *General Comment No15* (2002) para 48.
[209] Special Rapporteur Report para 34.
[210] CESCR *General Comment No15* (2002) para 12(c)(iv).
[211] See section 6 3 4.
[212] International Finance Corporation *Performance Standards on Environmental and Social Sustainability* (2012) para 30.

planned tariffs. All changes to existing policies need to be announced and made public.[213]

The State must disseminate information regarding the water privatisation contract before it enters into such an agreement.[214] The water privatisation documents must not be deemed confidential and members of the public must have access to them since they relate to the provision of a public service. Significantly, issues such as commercial confidentiality must not imperil transparency requirements.[215] Key information relating to the privatisation proposal which must be available is the following:

a) information on the human rights impact assessments to be carried out during the duration of the contract and the duration of such assessments;

b) how the State intends to make water services economically accessible to everyone, including information on subsidies, safety nets, and any other intervention policies to make water services accessible;

c) information on any laws, policies and regulations relating to water services as well as procedures available for disconnection of water services;

d) the regulatory framework in place to regulate water services providers to ensure such services are physically accessible, affordable, safe and sufficient;

e) information on State-based judicial and non-judicial mechanisms to hold water services providers to account for any breach of the right to water.

In the Cochabamba privatisation, the details of the negotiations between the government and the contractor remained unknown to the public.[216] Some of the details on the content of the negotiations only emerged after the so-called "water war."[217] The water privatisation agreement specifically required confidentiality regarding all information that the parties "might find out or have direct knowledge in

[213] WASH et al *The Human Right to Safe Drinking* 31.
[214] See section 6 3 4.
[215] See section 6 3 4.
[216] McFarland Sanchez-Moreno & Higgins 2003-2004 *Fordham International Law Journal* 1752.
[217] 1753.

virtue of their participation in [the] [c]ontract and in the negotiations."[218] This obligation extended to all personnel working for either party to the privatisation agreement. Significantly, such confidentiality would continue for five years after the termination of the contract, regardless of the reason.[219]

Legislation should strictly regulate contractual terms which purport to restrict the disclosure of information held by the authority relating to the privatisation contract beyond the restrictions permitted by relevant constitutional provisions and access to information legislation. In other words, public authorities should not be permitted to "contract out" of their statutory obligations in terms of any laws enabling public access to information held by the State. Public authorities should disclose any information in response to a request, regardless of the terms of any contract unless there is a valid statutory exemption provided for under any applicable law. Where it is necessary to include commercial confidentiality provisions in a water privatisation contract (and these provisions are mandated by relevant constitutional provisions and legislation) an option could be for this commercial information to be included in a separate schedule to the privatisation contract. This schedule must clearly identify information which should not be disclosed. It is however important for local authorities to take extreme care when drafting such a schedule, and be aware that any restrictions on disclosure provided for could potentially be overridden by their obligations under applicable legislation.

The United Kingdom (hereinafter referred to as the "UK")'s Freedom of Information Act Chapter 23 of 2000 (hereinafter referred to as "Freedom of Information Act"), for instance, recognises that there may be valid reasons for withholding information held by a public authority in response to an information request.[220] The Freedom of Information Act lays out twenty-three situations in which such information is considered exempt from public disclosure. It is noteworthy though that only information that is in fact confidential in nature, or which could prejudice a commercial interest if released, can be withheld from disclosure under the provisions of the Act.[221] Nevertheless, it is important that any commercial confidentiality clause in a water privatisation agreement must be subject to a public interest test to

[218] 1752-1753.
[219] 1753.
[220] See section 23 of the Freedom of Information Act Chapter 23 of 2000.
[221] See for instance sections 40, 41, 43 & 44.

encourage transparency.[222] Furthermore, any constraints to accessing public information should be drafted as narrowly as possible in order to avoid unnecessary secrecy. Significantly, public authorities should only be permitted to withhold information regarded as commercially sensitive where the public interest in maintaining the exemption outweighs the public interest in disclosing the information in question. Additionally, public authorities should be aware that changing circumstances could strengthen the public interest arguments in favour of disclosure of information relating to the terms of a water privatisation agreement.[223]

The UK's Information Tribunal, for instance, has confirmed that information contained in a contract between a public authority and a third party represents the conclusion of negotiations between the two parties. Such information is therefore jointly created rather than being obtained by the public authority from the private contractor. It is therefore not confidential information hence should be disclosed to the public if need be.[224] In a related case, the UK's Information Tribunal has stated that, in the context of commercial contractual confidentiality, there is no requirement for an exceptional case to be made in order for the duty of confidence to be overridden on public interest grounds.[225]

Finally, it should also be noted that the nature of information will change over time. For example, if information that was once considered confidential subsequently becomes public knowledge it will lose its quality of confidence. In the Cochabamba case, as discussed in chapter 3,[226] much of the information was disclosed during the subsequent arbitration that took place between the private water provider and Bolivia. Similarly, information that was commercially sensitive during the tendering process may no longer be sensitive once the privatisation contract has been signed.[227] Public authorities will, therefore, need to be very careful when negotiating such commercial confidentiality clauses. By agreeing to wide definitions of what constitutes "confidential information," the public authority may unwittingly place itself in a

[222] Section 2.
[223] Section 2. South Africa's Promotion of Access to Information Act No 2 of 2000 (hereinafter "PAIA") also contains a public interest override. Section 46(b) of PAIA provides that the information officer of a public body must grant a request for access to a record of the body where "the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."
[224] *Derry City Council v Information Commissioner* EA/2006/0014.
[225] *S v Information Commissioner & The General Register Office* EA/2006/0030.
[226] See section 3 5 4, chapter 3.
[227] Information Commissioner's Office *Freedom of Information Act Awareness Guidance No 5: Commercial Interests* 2.

dilemma when faced with a request for information covered by such a clause - to breach its statutory obligation or to ignore a contractual clause.[228]

6 3 4 2 The water services provider: Responsibility to furnish information

The water services provider must give details to all stakeholders including the affected community on the estimated duration of proposed project activities. It should also provide relevant details on any risks to, and potential impacts on, affected communities. This should include details of any mitigating measures it proposes to adopt as well as the envisaged community consultation process discussed above. The private operator should also provide relevant information on how the communities may access the internal corporate grievance mechanism to address any community grievances.[229] The relevant information should include:

a) Documents on the financial situation of the bidding corporation, including financial statements of overall turnover and profits over the preceding few years as well as audited accounts and proof of adequate liability insurance. Such information may also be helpful to the State in its selection process and the eventual awarding of a water privatisation agreement;

b) Accurate information on its technical and financial competencies during the bidding process so as to help ensure that there is no strategic underbidding and its resulting negative consequences discussed above;

c) Information on the ownership and, if applicable subsidiary corporation relations;

d) Information on the qualifications, skills and expertise of its management;

e) Information on any contracts relating to the provision of water services awarded in the last few years as well as on concessions awarded for the provision of water services similar to the one applied for[230] This will assist the State in assessing the technical, financial and social suitability of the

[228] 4.
[229] IFC *Performance Standards on Environmental and Social Sustainability* para 30.
[230] M Cottier "Elements for Contracting and Regulating Private Security and Military Companies" (2008) 88 *International Review of the Red Cross* 637 641.

corporation to operate and manage water services in a way that is compatible with the right to water;

f) Information on the due diligence, ethics and training of its employees;

g) Detailed information on how the water services provider intends to undertake a human rights impact assessment of the privatisation project, the duration and frequency of the assessment; and

h) Operational information relating to the sufficiency, water quality, regularity of supply, accessibility and information relating to its pricing strategy.[231]

The following section discusses some good practices in international and comparative law relating to access to information.

6 3 5 Access to information: Good practices in international and comparative law

Lesotho's Water Act 31 of 2003 (hereinafter referred to as the "Water Act") provides for a water management institution, at its own expense, to make information at its disposal available to the public in an appropriate manner.[232] The Water Act, however, contains a problematic provision. The release of such information may be subject to "such limitations relating to public security or commercial confidentiality as may be appropriate."[233] Such a clause may be used to deny the public access to relevant information pertaining to water issues such as the terms of privatisation contracts, water quality issues, the tendering process, as well as bid documents.[234]

Section 32 of the Constitution of the Republic of South Africa states that everyone has the right of access to any information held by the State and any information held by another person and that is required for the exercise or protection of any rights. The Promotion of Access to Information Act 2 of 2000 (hereinafter referred to as "PAIA") was enacted to give effect to section 32 of the Constitution. [235] Where any information request is made in terms of PAIA, the private or public body to whom the request is made is obliged to release the information, except where

[231] See Special Rapporteur Report para 47.
[232] See article 31 of Water Act of 2008.
[233] Article 31.
[234] Article 31.
[235] Promotion of Access to Information Act No 2 of 2000.

PAIA expressly provides that the information must not be released.[236] PAIA sets out the requisite procedural issues attached to such an information request. Any person, who requires information for the exercise or protection of any rights, may request information from a private entity, including a water services provider. Section 50 of PAIA explicitly states that a person requesting access to information held by a private body must be given access if such information is required for the exercise or protection of any rights. Such a provision is applicable where an individual or community seeks to access information relating to the provision of water services held by a private water services provider. Although commercial information belonging to a private entity is a ground of refusal to disclose information,[237] PAIA provides for a public interest exemption. Section 70 of PAIA provides that the head of a private entity must grant a request for access to a record of the private entity where "the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."[238]

The Water Services Act 108 of 1997 (hereinafter referred to as the "Water Services Act") provides for the establishment of a national information system on water services.[239] The Water Services Act elaborates that the purpose of the national information system is to record and provide data for the development, implementation and monitoring of national policies on water services. The national information system also serves as a repository to provide information to water services institutions and the public in order to help in monitoring the performance of water services providers as well as providing information for research purposes.[240] The public is entitled to reasonable access to the information contained in the national information system. The only limitation to access is where disclosure of information may infringe an individual's rights protected under the Bill of Rights enshrined in the South African Constitution.[241] The Water Services Act enjoins the Minister responsible for water services to take reasonable steps to ensure that information relating to water services is in an accessible format.[242]

[236] Grounds for exempting information from disclosure are stipulated in section 4 of PAIA.
[237] See section 68(1) of PAIA.
[238] See section 70.
[239] Section 67(1) of the Water Services Act No 108 of 1997.
[240] Section 68.
[241] Section 67(3).
[242] Section 67(4).

Honduras' Framework Law for Drinking Water and the Sanitation Sector Decree No 11 of 2003 (hereinafter referred to as the "Framework Law for Drinking Water and the Sanitation Sector") provides that users of public water services must enjoy, inter alia, the rights to receive information about the provision of the service. The Framework Law for Drinking Water and the Sanitation Sector also guarantees public access to information on the tariff system and method of payment, as well as plans regarding the expansion and improvement of services. The information must be provided in sufficient detail to enable individuals and communities to exercise their rights as water users.[243] The following section discusses fair procedures for disconnection of water services in a privatisation context and the relevant practices from different jurisdictions.

6 3 6 Fair procedure for disconnection of water services

A key concern in any water privatisation scenario is the likely disconnection of water services for non-payment as illustrated in the case studies discussed in chapter 3 above.[244] The CESCR has elaborated that arbitrary or unjustified disconnection from water services or facilities constitute *prima facie* violations of the State's obligation on the realisation of the right to water.[245] Laws and policies that permit service providers to disconnect water services to users in response to the non-payment of bills must allow for due process.[246] The disconnection of water services, especially in the case of inability (as opposed to a refusal) to pay should be approached with the utmost caution and should only occur as a last resort after due consultation and minimum water services provision is in place. The water services provider must ensure that an individual or community faced with the disconnection of water services is given opportunities to be heard and to rectify the situation.[247] The water services provider must also ensure that basic minimum amounts of water services are made available to the defaulting individual or group regardless of ability to pay to protect the defaulting user's dignity, health and other human rights.[248] The defaulting party's personal circumstances must also be taken into account when making a decision to

[243] See article 25(2) of the Decree No 118 of 2003, Framework Law for the Drinking Water and Sanitation Sector. Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 179.
[244] See section 3 5 2 6, chapter 3.
[245] See CESCR *General Comment 15* (2002) para 44(a).
[246] de Albuquerque & Roaf *On Right Track* 59.
[247] 59.
[248] 59.

disconnect water services. Water services providers should pay special attention to individuals and groups who have traditionally faced difficulties in exercising their right to water and should desist from disconnecting such groups from accessing basic amounts of water for personal and domestic uses. This includes women, children, the elderly, asylum seekers and victims of natural disasters and those who are too poor to pay.[249]

The water services provider must ascertain the financial means of the person or household including any particular vulnerabilities such as illness or other conditions requiring special access to water.[250] In the case of *Mazibuko and Others v City of Johannesburg and Others* discussed in chapter 4 above,[251] (hereinafter referred to as "*Mazibuko case*"), expert evidence led during the hearing of the case in the High Court showed that the residents of Phiri were mainly poor, uneducated, unemployed, elderly, sickly and ravaged by HIV/AIDS.[252] A majority of the residents survived on State pensions or grants.[253] It was further explained that people living with HIV/AIDS require more water on a daily basis than non-HIV infected individuals to maintain their health, standard of living and dignity.[254] This is because such persons require water regularly for personal and domestic uses such as washing, drinking, bathing and cooking. The court further noted that the caregivers of such persons also need water regularly to wash their hands. Although the *Mazibuko* case did not directly deal with water privatisation, it nevertheless addressed issues that are fairly common in privatisation scenarios such as the importance of free basic water policies to enable poor communities realise their right to water. The *Mazibuko* case, also dealt with the question of the legality of prepayment water meters in light of the right to water provided for in the Constitution, and the impact of operationalising such gadgets in poor communities. Despite strenuous arguments to the contrary on behalf of the Phiri community, the South African Constitutional Court upheld the constitutionality of prepaid water meters.

The problem with prepaid meters in such a situation is that, unlike conventional credit meters, the poor communities are not provided with procedural

[249] See CESCR *General Comment 15* (2002) para 16.
[250] 59.
[251] See section 4 5 1 3, chapter 4.
[252] *Mazibuko and Others v City of Johannesburg (Centre on Housing Rights and Evictions as amicus curiae)* 2008 (4) All SA 471 (W) paras 5 & 69.
[253] Para 69.
[254] Para 172.

safeguards before disconnection of water services.[255] The use of prepaid water meters does not provide for notice and an opportunity to make representations in the event of difficulties in paying for water consumption beyond the free basic supply.[256] Prepaid meters are therefore strongly discouraged particularly when it comes to an important human rights issue such as the right of access to safe water. Where it becomes inevitable to disconnect water services, those affected must be given reasonable notice of the planned disconnection. They should also be given an opportunity to have recourse to legal assistance for the purpose of obtaining any available remedies.[257] Disconnection of water services often disproportionately affects minority and low-income groups more than any other segments of the population. In her 2011 country mission to the United States of America, the Special Rapporteur visited a neighbourhood in Boston, Massachusetts.[258] It was reported that, for every one per cent increase in the minority population in the neighbourhood, the number of disconnections by water service providers in that area rose by four per cent.[259] One way to avoid any negative impact of disconnections on human right to water is to adopt legislation to ban them outright.

It is important that the judiciary interpret the constitutional and statutory provisions in a way that gives full effect to normative purposes and standards embodied in the right to water. The South African Water Services Act provides a very useful template that can be used to hold water services providers accountable in this respect if properly implemented.[260] As illustrated in chapter 4 above, the water services provider is obliged to ensure that any procedures for the limitation or discontinuation of water must be fair and equitable.[261] These procedural safeguards against arbitrary discontinuation of water services for non-payment are critical in

---

[255] See section 4 5 1 3, chapter 4 for an in-depth discussion of prepayment meters in the *Mazibuko* case.

[256] As argued by Liebenberg:

> See S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 479.

[257] For example CESCR *General Comment No 15* (2002) para. 56.

[258] See United Nations Human Rights Council Report *of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation on her mission to the United States of America* (2011) A/HRC/18/33/Add.4

[259] UN Human Rights Council Report *of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation on her mission to the United States of America* (2011) A/HRC/18/33/Add.4 para 50.

[260] See South Africa's Water Services Act No 108 0f 1997.

[261] The above provisions were successfully enforced by a South African court in the case of *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) discussed in section 4 5 1 1, chapter 4

ensuring that disadvantaged and marginalised sections of society have uninterrupted access to water services, regardless of whether the service is publicly or privately provided, or both.[262] The following section discusses some comparative law relating to procedural safeguards against arbitrary discontinuation of water services.

In Belgium, a decree adopted by the Government of Flanders in 1996 provides for a presumption against disconnection of the minimum supply of basic services such as water, electricity and gas.[263] The only exception that permits for the disconnection of minimum supply of such basic services is in cases of evident unwillingness to pay and fraud.[264] However, it is important to note that any disconnection of minimum services based on unwillingness to pay or fraud must still be approved by a Local Advisory Committee whose composition is determined by the Government of Flanders. The provider of water services must lodge a request with a local municipality's Local Advisory Committee for the disconnection of the prescribed minimum supply of water services.[265] In Flanders every individual has the right to a minimal supply of 15 m^3 of free water per person per year.[266] Armeni notes that this "individual approach," to allocating free water to individuals and not to households as units, regardless of the number of inhabitants per household, seeks to increase equality in the allocation of free water services among families in the long term.[267] The Local Advisory Committee is obliged to investigate and issue a motivated decision within fourteen days of receiving the request.[268] The above decree adopted by the Government of Flanders and the procedures enunciated thereunder provide fair procedures especially in privatisation situations to protect marginalised and poor communities against disconnection of minimum supply of water services except in cases of fraud or unwillingness to pay.

---

[262] See Chirwa 2004 *Law, Democracy and Development* 198. The South African Constitutional Court adopted a limited and formalistic interpretation of this right in the *Mazibuko* case. See section 4 5 1 3, chapter 4.

[263] See Parliament of Flanders (Belgium) *Decree Regulating the Right to a Minimum Supply of Electricity, Gas and Water* (1996). Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 267.

[264] See article 6.

[265] Article 7.

[266] C Armeni *The Right to Water in Belgium* (2008) <http://www.ielrc.org/content/f0802.pdf> (accessed 21.09.2012)1.

[267] 1-2.

[268] See article 7, Parliament of Flanders (Belgium) Decree Regulating the Right to a Minimum Supply of Electricity, Gas and Water of 1996.

In Indonesia, a policy document adopted by the Minister of Home Affairs in 2006 on "Technical Guidance and Procedures for Regulating Tariffs"[269] provides on the need for water services tariffs to be affordable to users. In this regard, the regulations state that tariffs on water services for personal and domestic use shall not exceed four per cent of the water user's monthly income.[270] The regulations further provide that "[j]ustice in the imposition of tariffs shall be achieved through application of differentiation tariffs and cross subsidy among group of subscribers."[271] The Technical Guidance and Procedures for Regulating Tariffs provide an important standard especially where water services have been privatised. The need for water services to be affordable in spite of the involvement of water services provider is in line with the normative content of the right to water enjoining economic accessibility of water services discussed in chapter 2.[272]

The implication of the above analysis is that an indigent person may not have his access to basic water services completely disconnected for non-payment. The underlying principle is that water services may not be disconnected where a water user is unable to pay for the water service.[273] The water services provider, to comply with the human right to water, should only limit the water supply of a defaulter to a basic water supply. This content varies from one jurisdiction to the other. For example, in South Africa it is 25 litres per person per day. As illustrated in chapter 2 above, the CESCR provided that the quantity of water available for each person should correspond to WHO guidelines though it further notes that some individuals and groups may also require additional water over and above that stipulated in the WHO guidelines due to health, climate and work conditions.[274]

In the event that a water services provider has to disconnect water services, the following steps must be taken in order for such an actor to comply with the standards imposed by the right to water. First, the water services provider must notify the water user of its intention to disconnect the water supply as a consequence of the

[269] See Ministry of Home Affairs *Technical Guidance for Regulating Tariffs of Drinking Water in Regional Administration-Owned Drinking Companies* (2006) article 3 <http://faolex.fao.org/67962.pdf> (accessed 10.08.2012).
[270] Article 3(2).
[271] Article 3(3).
[272] See section 2 6 4, chapter 2.
[273] See A Kok "Privatisation and the Right of Access to Water" in K de Feyter & FG Isa (eds) *Privatisation and Human Rights* (2005) 259 282.
[274] See 2 5 2 4, chapter 2.

water user's non-payment for past water usage.[275] The water services provider must notify the water user in the same notice of an opportunity to pay the arrears and invite the user to make representations as to why his water supply should not be disconnected. Such a notice must clearly identify to whom the water user may direct such representations and the period within which such representations can be made. Significantly, such a process should not be merely illusory but should genuinely consider the water user's representations with objectivity. In the event that the water user fails to settle the arrears or make any representations, or fails to convince the water services provider to defer or set aside its decision to disconnect water services, the water services provider may proceed to limit or discontinue the water supply.[276] The water services provider must notify the water user of its decision and indicate any remedies available, including the possibility of appealing the decision, if the applicable legislative framework provides for an appeal process.[277] These procedural safeguards provide an important standard especially where water services have been privatised. Such procedural safeguards will help forestall arbitrary or unjustified disconnection from water services or facilities due to non payment, even in circumstances where there is clear evidence that the defaulting party does not have the financial resources is to pay for water services. Even where there are just grounds to disconnect water services, the procedural safeguards are particularly important in privatised contexts to ensure that any disconnection to from water services does not deprive access to minimum essential amount of water that is sufficient and safe for domestic uses to prevent disease particularly for socially disadvantaged groups.

6 3 7 Conclusion

The above section proposed and analysed an accountability model to ensure that States and other non-State actors involved in the provision of water services have clearly designated roles and responsibilities consistent with the human right to water. An important aspect of the model is the State's duty to protect the right to water against abuse by third parties, including corporations. The State is enjoined to

[275] M Kidd "Not a Drop to Drink: Disconnection of Water Services for Non-Payment and the Right of Access to Water" (2004) 20 *South African Journal on Human Rights* 119 130.
[276] 130.
[277] 130.

prevent, investigate and punish the abuse of the right to water through adopting appropriate policies, regulatory and adjudication mechanisms.

This section also analysed the procedural elements of the accountability model, focusing on the decision whether or not to privatise the provision of water services, the terms of a water privatisation contract, and the operation of water services during the tenure of the privatisation contract. The procedural components of the right to water such as consultation, participation and access to information were also identified, and specific examples of how these procedural standards are implemented in practice were examined.

6 4 Substantive obligations imposed by the right to water

6 4 1 Introduction

The preceding sections examined the procedural components of the right to water, and how these have been implemented in practice. However, as analysed in chapters 4[278] and 5,[279] water as a human right also imposes obligations on public and private water services providers to ensure that the delivery of water services conforms to certain substantive standards. The Committee on Economic, Social and Cultural Rights (hereinafter referred to as "CESCR") has elaborated on these standards, explaining that water services must be adequate, of sufficient quality, as well as physically and economically accessible. The following section examines practices from across the world pertaining to how these substantive standards have been implemented, and seeks to identify emerging good practices in this context.

6 4 2 Availability

The CESCR has explained that the availability component of the right to water to mean that water supply for each person should be sufficient and continuous for personal and domestic uses.[280] The standard of availability requires a definition of what constitutes sufficient water. The CESCR elaborated in General Comment 15 that the quantity of water available for each person should correspond to the World Health Organisation Guidelines as discussed in chapter 2.[281] The quantity required

[278] See section 4 2 1 – 4 2 4, chapter 4.
[279] See section 5 3 3, chapter 5.
[280] Para 12(a). See section 2 5 2 4 for discussion on the availability component.
[281] See section 2 6 2, chapter 2.

by each person varies to a certain extent based on circumstances such as sex, age, climate and temperature conditions.[282] The following section proceeds to consider various national benchmarks in relation to the adequacy of water.

In South Africa, the normative standard is set by the Water Services Act and the Regulations Relating to Compulsory National Standards and Measures to Conserve Water of 2001 (hereinafter referred to as the "Regulations")[283] as highlighted in chapter 4.[284] The Water Services Act provides for a prescribed minimum standard of water supply service necessary for the reliable supply of a sufficient quantity and quality of water to households where as the Regulations provide for a minimum standard for basic water supply.[285]

In Nepal, the National Urban Water Supply and Sanitation Sector Policy of 2009 provides for the State to ensure provision of basic service levels of potable water services to all in urban areas.[286] It provides for "a minimum quantity of 25 litres per capita throughout the year at an accessible point of no more than 250 meters of every urban abode."[287] Burkina Faso's Decree Governing Domestic Water Uses No 580 of 2004 provides that "the threshold for domestic use is fixed at one hundred litres of water per person per day."[288] In Sri Lanka, the Rural Water Supply and Sanitation Policy provides that the minimum requirement of water for direct consumption, preparation of food and personnel hygiene is 40 litres per person per day. It is further stated in the Rural Water Supply and Sanitation Policy that these guidelines are the minimum requirements needed to ensure health and the levels of services to ensure a dignified life.[289] Belarus's Council of Ministers Decision No 724, on Measures for the Establishment of a System of State Social Service Standards for the Population of the Republic provides for obligatory water provision to citizens who live in apartment houses connected to the centralised water supply and canalisation.

---

[282] The quantity of water needed as a minimum varies in different circumstances. Sex, age, temperature and labour conditions play a role. See Bartram & Howard *Domestic Water Quantity* 22.

[283] See Regulation 3 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water 2001 Government Gazette, Gazette No 22355, Notice R509 of 2001.

[284] See section 4 5 1 3, chapter 4.

[285] See Regulation 3 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water 2001 Government Gazette, Gazette No 22355, Notice R509 of 2001. See section 4 5 1 3, chapter 4.

[286] National Urban Water Supply Policy (2009) <http://www.ngoforum.net/index.php?> (accessed 26.07.2012).

[287] See article 9.1 of the National Urban Water Supply Policy.

[288] See article 3 of the Decree No 2004-580/PRES/PM/MAHRH/MFB Governing Domestic Water Uses (2004). Translated and reported in WASH et al *The Human Right to Safe Drinking* 270.

[289] See article 3(2) of *The Rural Water Supply and Sanitation Policy (*2001) <http://www.waterboard.lk/scripts/> (accessed 26.07.2012).

The water quantity provided should not be less than 180 litres per person per day. This includes a supply of not less than 90 litres per day of hot water.[290] The Council of Ministers Decision also provides for an obligatory water provision for citizens who use water from the water posts of 35 litres a day per person.[291]

The right to water requires that everyone must have access to "sufficient and continuous water for personal and domestic use."[292] Norms for minimum quantities of water to be supplied have been adopted as indicated in the above discussion.[293] The requirement that water be economically accessible to everyone may necessitate the provision of free or low cost water for personal or domestic uses.[294] Legislation should specify what needs the minimum quantity of water should be sufficient to meet, for example survival, health and dignity. It is important to avoid a rigid, a-contextual reliance on the above standards. Access to water services is often characterised by great disparities within countries and between different sectors of the population. The water needs of individuals and groups vary according to climatic conditions, lifestyle, culture, tradition, diet and technology.[295] The decisions about defining the minimum quantity will depend on the climatic conditions, social and economic status of water users and resources availability. Privatisation of water services should not result in vulnerable and poor people communities being denied access to a minimum amount of water for personal and domestic uses.

6 4 3 Quality

There is no doubt that sufficient water alone is not enough to ensure a human right to water. For the right to be satisfied the quality of water must also be safe. This implies that water for personal and domestic use "must be…free from micro-organisms, chemical substances and radiological hazards."[296] This is in recognition of the fact that even though many people may receive this basic water requirement or more, in some cases the water delivered may not be of adequate quality. Additionally,

[290] See article 3.2 of the Council of Ministers Decision no 724 "On Measures for the Establishment of a System of State Social Service Standards for the Population of the Republic" (2003). Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 270.
[291] Article 3.2.
[292] CESCR *General Comment 15* (2002) para 12(a).
[293] See World Health Organisation *Domestic Water Quantity, Service Level and Health* (2003) 1.
[294] See Chirwa 2004 *African Human Rights Law Journal* 240.
[295] See Gleick 1996 *Water International* 83 84.
[296] CESCR *General Comment 15* (2002) Para 12(b).

General Comment 15 stipulates that water for personal and domestic use must be of an acceptable colour, odour and taste.[297]

The WHO has explained that the highest health risks to water services come from pathogenic organisms, such as viruses, bacteria or fungi that can cause severe diseases.[298] Chemical contamination of water sources from agricultural and industrial sources also poses a considerable risk to people's health.[299] Additionally, water that does not create an immediate threat to people's health can still be unacceptable since many people will interpret water which is of a strange colour, odour or taste as being unsafe. The CESCR has explained that water is also essential to enjoying certain cultural practices.[300] Cultural preferences and practices of relevant communities cannot be ignored in water services delivery, particularly indigenous communities who may rely on water for religious practices.

In the United States of America, the Safe Drinking Water Act of 1974 Public Law No 93-523 (hereinafter referred to as "SDWA") sets stringent minimum standards for water quality in all 50 states.[301] While each state may promulgate and enforce higher standards for public sources within their borders, none may fall below the federal standards. States are required to produce regular water quality assessments, which must be made public.[302] Water services providers failing to maintain the minimum water quality standards may face civil or even criminal actions brought by state or federal executive agencies.[303] The SDWA requires quality monitoring for all public water sources as well as private water services serving more than 25 individuals, hence risking the exclusion of individuals who live in remote areas.[304]

Côte D'ivoire's Water Code Law No 98-755 of 1998 (hereinafter referred to as the "Water Code") obliges any actor involved in the provision of water services to

[297] Para 12(b). For a discussion, see 2 6 3, chapter 2.
[298] See World Health Organisation *Guidelines for Drinking Water Quality* (2011). <http://whqlibdoc.who.int/publications/2011/9789241548151_eng.pdf> (accessed 22.08.2012).
[299] WASH et al *The Human Right to Safe Drinking Water* 42.
[300] CESCR General Comment 15 (2002) para 6. See 3 5 4, chapter 3 for a discussion of the water privatisation in Cochabamba and its impact on the cultural life of indigenous communities.
[301] 59.
[302] 59.
[303] 59.
[304] See UN Human Rights Council *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque Mission to the United States of America A/HRC/18/33/Add.4* (2011).

ensure that the water provided is potable and complies with quality standards.[305] The Water Code further prohibits any "spills, waste dumps of any kind, or of radioactive waste, causing or increasing pollution of water resources."[306] Paraguay's Law 1614 of 2000 governing tariffs for public drinking water services gives water users the right to demand the provision of a quality water service from the water provider.[307] Malaysia's Water Services Industry Act 655 of 2006 provides that a water services provider shall, when, supplying water to any premises, ensure that at the time of supply the quality of water complies with the minimum quality standards prescribed by the Minister responsible for water services.[308] The water services provider is also obliged to ensure that there is no deterioration in the minimum quality standards of the source from which water is supplied.[309]

In Sri Lanka, the National Policy on Water Supply and Sanitation of 2002 (hereinafter referred to as the "National Policy on Water Supply") provides for a Water Sector Regulatory Commission responsible for the quality of the water provided by water services providers to ensure compliance with national water standards.[310] The National Policy on Water Supply further provides for the development and implementation of a certification programme for water quality testing laboratories of water service providers.[311] Kyrgyzstan's Law No 33 on Drinking Water provides for the rights of water users to demand, from water service providers, adequate information about the quality of water services. Water users have the right to demand water services that are in conformity with prescribed standards and sanitary rules and regulations.[312] Should water users identify any non-conformity of the water quality with specific parameters, evidencing a threat to public health, the water services provider must ensure the immediate notification of water

[305] See article 79 of the Water Code, Law No 98-755 of 1998. Translated and Reported in WASH et al *The Human Right to Safe Drinking Water* 142.
[306] Section 79.
[307] See Law 1614 of 2000. Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 168. See also Indonesia's Government Regulation No 16 of 2005 Regarding Development of Drinking Water Supply Systems and Sanitation which provides in article 67 (1)(a) that "every customer of drinking water service and sanitation have the right to obtain drinking water services which meet the requirements of quality, quantity, and continuity in accordance with the determined standards."
[308] Article 41(1) of the Water Services Industry Act 655 of 2006.
[309] Article 41(2).
[310] See article 3.6(a) of the National Policy on Water Supply and Sanitation of 2002. Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 218.
[311] Article 3.6(b).
[312] See article 19 of the Law on Drinking Water Law No 33 of 1999. Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 256.

users through the media.[313] The notice should include information about precautionary measures to curtail any potential health threats to water users.[314] These procedural safeguards are important, especially where water services have been privatised as this will ensure that non-State involvement in the provision of water services does not compromise the quality of water. Failure to provide access to safe water of appropriate quality will constitute infringement of the right to water.[315]

The 2009 Drinking Water Law of the Netherlands (hereinafter referred to as "Drinking Water Law") contains provisions on water quality that may potentially serve as standards, especially in privatisation scenarios.[316] The water law provides that the owner of a water company shall guarantee the quality and sustainability of the production and distribution of water services.[317] The water services provider is obliged to protect the sources of drinking water from pollution in its distribution area. The water services provider is also required to conduct research on the quality of water sources and areas around these sources to prevent or reduce pollution.[318] The Drinking Water Law also specifically enjoins a water services provider to ensure that drinking water is not contaminated by organisms, parasites or substances in quantities or concentrations per unit volume which results in adverse effects on public health.[319] The water service provider is required to ensure that the design and condition of water supply works, equipment and pipe networks do not pose a threat of contamination to connecting public water supply networks.[320] Finally, the Law provides for monitoring the quality of drinking water and the materials and chemicals used by water services providers during the extraction, preparation, storage and distribution of water.[321]

The Committee on Economic, Social and Cultural Rights has stated that the State has an obligation to prevent third parties, including private water providers from "compromising equal, affordable, and physical access to sufficient, safe and

[313] Article 19.
[314] Article 19.
[315] See 2 6 3, chapter 2 for a discussion of the qualitative aspects of the right to water as elucidated by General Comment 15.
[316] Drinking Water Law of 19 July 2009. Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 256.
[317] Article 7(d).
[318] Article 7(A)(1) & (2).
[319] Article 21.
[320] Article 21.
[321] Article 21 (a)-(c).

acceptable water."[322] Although an important component of the right to water, the sufficiency of water services is not enough for water to be acceptable and thereby comply with the standards imposed by the right to water. The importance of ensuring that water services are of appropriate quality cannot be emphasised. The privatisation of water services should not have a negative effect on the quality of water provided by the non-State actor. National legislation or regulations relating to water services should explicitly provide that the non-State actor must ensure that the physical, chemical, biological and aesthetic properties of water provided are such that it is safe to use. Furthermore, the privatisation contract should also explicitly provide that a water services provider is bound by any constitutional and statutory provisions or regulations relating to water quality.

6 4 4 Physical accessibility

The CESCR has also elaborated on accessibility of water services as a constituent element of the normative content of the right to water.[323] This means that "[w]ater and water facilities and services have to be accessible to everyone without discrimination."[324] The importance of access to information on water issues was discussed in part 6 3 5 above. This section discusses another dimension of accessibility as elaborated by the Committee on Economic, Social and Cultural Rights (hereinafter referred to as "CESCR"), the need for water to be physically and economically accessible.[325] The section also discusses how this norm has been implemented in practice.

The CESCR has explained that water services should be within safe physical reach for all members of the community.[326] This will ensure physical access to water facilities that provide sufficient, safe and regular water. Water services facilities should have a sufficient number of water outlets to avoid long waiting times and be at a reasonable distance from the household.[327] In order to ensure accessibility for all sectors of society, special attention may need to be given to people with special needs.[328] As illustrated in chapter 2, one of the obligations imposed by the the right to

[322] CESCR *General Comment 15 (2002)* para 24.
[323] See chapter 2 above section 2 6 4.
[324] Para 12(c).
[325] Para 12(c).
[326] Para 12(c)(i).
[327] CESCR *General Comment 15 (2002)* para 37(c).
[328] WASH et al *The Human Right to Safe Drinking Water* 35.

water is that water services must be accessible to everyone.[329] It also means that when the State delegates provision of water services to a private water services provider, national legislation and regulations relating to water services should impose duties on the water services provider to extend water services to previously unserved and underserved areas. Such legislation should also enjoin water services providers to ensure that: water services are physically accessible to the entire community; water services facilities should have a sufficient number of water outlets; and that water services are at a reasonable distance from households, schools and other public places.

Water services providers in privatised situations have often been criticised for cherry-picking financially attractive areas within regions, countries, cities and neighbourhoods, where a high rate of return can be expected.[330] It is important to note that normally the coverage of services provided by non-State actors in situations of water privatisation is the result of political decisions and a contract proposed by the public authorities. A non-State service is unlikely to extend services to unserved or underserved areas unless explicitly mandated to do so in the privatisation contract.[331] The State should resist the pressure to invest in and prioritise only neighbourhoods where interventions are less expensive and complex. The State is obliged to realise the rights to water for all, including the marginalised members of society.[332] The State and the water services provider must develop a comprehensive and coherent approach targeting the provision of water services to currently unserved and underserved areas.[333] During the contract negotiation process, relevant public authorities must carefully consider the areas where it delegates provision of water services to a private operator, the coverage levels to be achieved, and the service levels to be met. National legislation relating to water services should enjoin the water services provider to ensure that water services are available within or in the immediate vicinity of each household as well as schools, workplaces, health-care settings and other public places. The water services provider should provide timelines on how it aims to fulfill this duty and the regulator must ensure that the water services provider fulfils its investment and operational undertakings with regard

[329] See 2 6 4, chapter 2.
[330] Special Rapporteur Report para 39.
[331] Para 39.
[332] Para 40.
[333] Para 40.

to the extension of service coverage. It was illustrated in chapter 3 that States are the primary duty bearers under the international human rights system.[334] The following section discusses some national standards on the accessibility of water services.

Namibia's Water Resources Management Act 24 of 2004 provides that access to water services must be available to every citizen within a reasonable distance from their place of abode.[335] Sri Lanka's 2004 Rural Water Supply and Sanitation Policy explicitly provides that "[t]he maximum haul of water to the dwelling of any user should not exceed 200m…[I]n steep terrain this should be reduced with consideration to the effort for hauling water."[336] In Kenya, the 2009 Model Water Services Regulations provide that a water services provider shall comply with the basic minimum standards of water supply.[337] The basic minimum standards are defined as the provision of appropriate education in respect of effective water use, provision of a minimum quantity of potable water of 20 litres per person per day or 6 kilolitres per household per month at a minimum rate of not less than 10 litres per minute and within 200 metres of a household.[338] The Water Services Regulations also provide that no water user shall go more than seven consecutive days in a month without water supply.[339] Kenya's 2007-2015 National Water Strategy further provides as one of its goals, the reduction in the time taken to the nearest public water outlet and back home to an average of 30 minutes in urban areas. The National Water Strategy also provides for the reduction to two kilometres of the distance in rural areas to the nearest public water outlet.[340]

Access to water assumes heightened importance especially where water services have been privatised. The mere availability of water services is not enough to comply with the right to water. For instance water facilities might be available in a jurisdiction, but physically inaccessible to the disabled, women, minorities, or other marginalised members of the community. Water facilities must be both available in a jurisdiction and also physically accessible to all, in law and fact, without discrimination. The water services provider must ensure that there is no

[334] See section 3 6, chapter 3.
[335] See section 3(b) of the Water Resources Management Act No 24 of 2004.
[336] See para 3.2.2 of the *Rural Water Supply Policy* (2004) <http://www.waterboard/ASP/Polic/asp> (accessed 23.08.2012).
[337] See Section 7 Model Water Services Regulations (2009) adopted by the Water Services Regulatory Board in terms of section 47 (1) (k) of the Water Act No 8 of 2002.
[338] Section 7.
[339] Section 7.
[340] See Ministry of Water and Irrigation (Republic of Kenya) *National Water Strategy 2007-2015* (2007) para 3.3.

discrimination in access to water services. Accessibility of water services is a key component of the right to water. Water services providers must ensure that water services are easily accessible to all, including children, the elderly and people with disabilities, in or near the household, workplace and in all other spheres of their lives. This includes ensuring that they do not have to queue or wait excessively to access water services.

6 4 5 Economic accessibility of water services

The Committee on Economic, Social and Cultural Rights explained in General Comment 15 that water, water facilities and services must be affordable for all.[341] It further states that the costs associated with securing water must be affordable and must not threaten the realisation of other rights protected in the International Covenant on Economic, Social and Cultural Rights.[342] States are thus obliged to adopt the necessary measures that may include appropriate pricing policies such as free or low-cost water to ensure that water services are affordable.[343]

Non-discrimination entails that water must be accessible to everyone, including the most vulnerable and marginalised sections of the society.[344] It was explained that water must be economically accessible.[345] The water services provider should not unnecessarily hike water tariffs as doing so would impede affordability of water services. The charging of exorbitant water tariffs is a pervasive practice, especially in instances where water services have been privatised or corporatised as shown by discussions on water privatisation in Tanzania, Bolivia, The Philippines and South Africa above.[346]

6 4 5 1 Pricing structures

Different approaches can be developed to structure the pricing for the provision of water services. It is often a challenge to come up with a pricing approach that does not create disincentives for the water services providers. For instance, where the State or a regulatory authority establishes tariff standards that bill water users on a scale according to incomes, it is possible that the water services provider may focus

[341] See section 2 5 2, chapter 2.
[342] CESCR *General Comment 15* (2002) para 12(c)(ii).
[343] Para 27.
[344] Para 12(c)(iii).
[345] See section 2 6 4, chapter 2.
[346] See section 3 5, chapter 3 for privatisation initiatives in Tanzania, Bolivia, The Philippines and South Africa.

on providing primarily or exclusively for affluent areas to ensure that they recover the costs of their investment and make a profit.[347] Similarly, adopting increasing block tariff rates, where the rate per unit of water increases as the volume of consumption increases, could also create a motive to focus on high volume users, instead of household users. Such an approach will most likely disproportionately affect marginalised and poor communities.[348]

In Tanzania, Energy and Water Utilities Regulatory Authority (hereinafter referred to as "EWURA") is mandated to regulate water services rates and charges.[349] The Energy and Water Utilities Regulatory Authority Act 11 of 2001 provides for factors that EWURA should take into account in making any determination on rates and charges for water services. These include the costs of making, producing and supplying goods or services. Other factors include the return on investment and relevant benchmarks such as international benchmarks for prices, costs and return on assets in comparable industries.[350] EWURA is further enjoined to consider the financial implications of the determination, the desirability of establishing maximum rates and charges, the interests of water users, and the desire to promote competitive rates.[351] The preceding provisions appear to conceptualise water primarily as an economic good as explicitly provided in the Dublin Statement discussed in chapter 2.[352] It is important for the regulatory authority not to be guided by full cost recovery for water services. Such an approach will, in all likelihood, price the water services out of the reach of poor and marginalised communities. Rather, the regulatory authority must ensure that water services are accessible to all in compliance with the right to water. Water tariffs should reflect the normative dimensions of water as a human right.

In the South African context, the Water Services Act empowers the Minister of Water and Environmental Affairs to prescribe norms and standards in respect of tariffs in the provision of water services.[353] Significantly, such standards permit for differentiation among geographical areas and categories of water users.[354] Importantly, South Africa's Municipal Systems Act requires a credit control and a debt

[347] WASH United et al *The Human Right to Drinking Water* 38.
[348] 38.
[349] See section 17of the Energy and Utilities and Regulatory Authority Act of 2001.
[350] See section 17(2)(a)-(c).
[351] See section 17(2)(d)-(g).
[352] See section 2 3, chapter 2.
[353] See section 10(1)(a) of the Water Services Act.
[354] Section 10(1)(a).

collection policy to make provision for indigent debtors' access to basic municipal services.[355] This provides a mechanism for ensuring that privatisation of water services does not result in an upsurge in water tariffs making access unaffordable. In order for the operations of the water service provider to be consistent with the right to water, a water services provider should thus ensure that water services are affordable to all including socially disadvantaged groups.[356]

A number of statutes from across the world provide for the adoption of measures to ameliorate the conditions of the less privileged and poor community members to access water services. The 1993 California Public Utilities Code provides that access to an "adequate supply of healthful water is a basic necessity of human life, and shall be made available to all residents of California at an affordable cost."[357] The California Public Utilities Commission (hereinafter referred to as the "CPUC") regulates privately owned water companies among other providers of public utilities. The California Public Utilities Code enjoins the CPUC to consider and implement programmes to provide rate relief for low-income ratepayers.[358] The CPUC may, in establishing the feasibility of rate relief for the poor and marginalised individuals and communities, take into account variations in water needs caused by geography and climate.[359]

Nicaragua's General Law on Drinking Water and Sanitation Services Law 297 of 1998 obliges the State to "establish a subsidy system to enable poor communities' access to potable water."[360] The subsidy system, limited to water for personal and domestic uses, is exclusively intended for low income sectors of the population.[361] The State is obliged to operationalise the system through cross subsidies between high income water users and low income water users. Equally, Nicaragua's General Law on National Water Resources of 2001[362] emphasises the State's responsibility to promote, provide, and adequately regulate the provision of potable water to the Nicaraguan people. Such water must be provided in a sufficient quantity and quality and at differentiated costs, while also supporting the marginalised sectors of

[355] Section 97(1)(c) of the Local Government: Municipal Services Act No 32 of 2000.
[356] See CESCR *General Comment 15 (2002)* para 27.
[357] See section 739.8(a) of the California Public Utilities Code of 1993.
[358] Section 739.8(b).
[359] Section 739.8(d).
[360] See Article 40 of Nicaragua's General Law on Drinking Water and Sanitation Services, Law No 297 of 1998. Translated and reported in WASH et al *The Human Right to Drinking Water* 197.
[361] See Article 40.
[362] See General Law on National Water Resources of 15 May 2007.

society.[363] Additionally, the General Law on National Water Resources stipulates that water services cannot be disconnected to hospitals, health centres, schools, orphanages, nursing homes, penitentiaries, fire stations and public markets for non payment.[364]

In the United Kingdom, the Water Industry Act Chapter 56 of 1991 (hereinafter referred to as the "Water Industry Act")[365] provides for the outright prohibition of disconnection of water services for non-payment in certain circumstances. Section 61 provides for premises that are exempt from disconnection. This includes water services to any dwelling occupied by a person as his or her only or principal home.[366] Accommodation for the elderly, hospitals, premises used for the provision of medical services, residential care homes, nursing homes and children's homes are all exempt from water disconnection for non-payment.[367] Premises used by an institution within the education sector for the provision of education and premises used for the provision of day care for children are also exempt from water disconnection for non payment.[368] The Water Industry Act also criminalises the use of water-limiting devices such as prepaid water meters.[369] The above legislative safeguards are important to protect vulnerable individuals and communities from being denied access to basic water services.

Madagascar's Water Code No 98-029 of 1999 provides that the tariff and cost recovery policies for drinking water services must consider investment and exploitation costs on the one hand, and water users' capacity to pay, on the other.[370] The Water Code also provides that the water tariff system shall include provisions ensuring poor communities access to water services for personal and domestic uses.[371]

---

[363] See article 5 of the General Law on National Water Resources of 15 May 2007. Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 140.
[364] Article 5.
[365] Water Industry Act Chapter 56 of 1991.
[366] See section 2(1) of schedule 4.
[367] See schedule 4.
[368] See schedule 4.
[369] See section 63A(1) & (2).
[370] See article 54 of Water Code Law No 98-029 of 1999.
[371] Article 54. See also article 368 of the Constitution of Colombia (1991) which provides that "[t]he Nation, the departments, the districts, the municipalities and the decentralised entities shall grant subsidies in their respective budgets, so that persons with low income may afford to pay the tariffs for the public household services covering their basic needs." Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 140.

The *Entidade Reguladora dos Serviços de Águas e Resíduos* (hereinafter referred to as "ERSAR"), the regulatory authority in Portugal has played a critical role in ensuring universal access to water services.[372] In Portugal, 93% of households have access to water services through house connections. ERSAR has adopted a number of rules for service providers, mandating, for instance, that any person living within 20 metres of the public system has the right to be served by that system.[373] Additionally, water services providers are required to respond to service requests within five days of receipt of a request for connection to the water network.[374] ERSAR has also implemented policies to control the affordability of water services. It has set a benchmark for the charges which may be levied in respect of each service (water and sewerage) at 0.5 per cent of average disposable income,[375] for an average consumption of 120 cubic meters per year. Additionally, ERSAR is working toward the elimination of connection charges.[376] To reduce the financial barrier that connection charges create for those seeking to access services for the first time, ERSAR incorporates the cost of connecting a new user into their regular tariff charges throughout the contract lifetime.[377] The idea is to ensure that beneficiaries will include low-income families that are failing to connect to the water network.

6 4 5 2 Significance of social policies

It is important that full cost recovery should not constitute an obstacle to providing affordable water services especially to poor and marginalised communities.[378] An exclusive focus on full cost recovery would render water services unaffordable for many users often resulting in health concerns or instability as witnessed in the Cochabamba water privatisation experience discussed above.[379] Special safeguards in the form of safety nets such as free or low cost water for indigent families,

[372] De Albuquerque and Roaf *On Right Track* 55. ERSAR is the Portuguese national water and waste services regulation authority established in 1998. ERSAR is the national authority for drinking water quality control and regulates wastewater management service. The regulatory agency is directed by a three-member Board, whose members are appointed upon the recommendation of the Minister of Environment. Provision of water services in Portugal is a shared responsibility between the 308 municipalities and the national, public holding corporation *Águas de Portugal*, and its subsidiaries.
[373] De Albuquerque & Roaf *On Right Track* 55.
[374] 55.
[375] 55. One of the problems associated with measuring affordability is deciding what measure to use. In this case, "disposable income" refers to income after tax. In the UK "disposable income" refers to income after housing costs have been eliminated. See De Albuquerque and Roaf *On Right Track* 70.
[376] 55.
[377] 55.
[378] Special Rapporteur Report para 55.
[379] Para 55.

subsidies and other supplementary social policies may be necessary to ensure that water services are available to everyone. Regulatory oversight alone may not be sufficient to ensure that the right to water is effectively protected.[380] Supplementary intervention mechanisms are necessary and can take various forms such as providing income supplements[381] or adjusting tariffs to render water services affordable.[382] Although water users will often be able to pay recurring charges for water services, a high one-off payment for the initial connection is often beyond the capacity of many, especially the poor and vulnerable members of society.[383] It is important that any subsidies should cater for connection costs in order to expand the network to low-income areas.[384]

Intervention measures adopted must not disproportionately benefit the affluent communities. Rather, such measures must be targeted to reach the unserved and underserved communities. Furthermore, the regulatory authority should carry out affordability studies and the results of such studies will constitute an important tool for taking decisions on how to target intervention measures.[385] Statutory frameworks are also vital for ensuring the affordability of water. Venezuela's 2001 Organic Law on the Provision of Potable Water and Sanitation Services addresses the affordability of water services[386] by establishing a variety of subsidies for low-income users. Such subsidies are designed to encourage both public and private services providers to expand access to low-income and under-serviced communities.[387]

Paraguay's Law No 1614/2000 on Tariff Regulations for Licensees (hereinafter referred to as "Law No 1614/2000") provides for a subsidy system for water services and connection fees, targeting the poor.[388] Law No 1614/2000 stipulates conditions for access to the subsidies. It provides that persons would be eligible for such subsidies where their socio-economic conditions are such that "it is impossible for the family of users living in the property to pay the full amount of the

[380] Para 55.
[381] CESCR *General Comment 15* (2002) para 27.
[382] Para 55.
[383] Para 55.
[384] Para 55.
[385] Para 55.
[386] See Organic Law on the Provision of Potable Water and Sanitation Services (2001) <www.hidroven.gov.ve/publicaciones/ LOPSAPS.pdf> (accessed 23.08.2012).
[387] For a discussion see De Albuquerque & Roaf *On Right Track* 54.
[388] See article 58 of the Tariff Regulations for Licensees with respect to Law No 1614/2000. Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 140.

value of the service."[389] Paraguay's General Department of Statistics, Surveys and Censuses are obliged to supply information on the socio-economic level of each subsidy applicant. The purpose of such information is to enable objective indicators on the socio-economic situation of the applicants to be established.[390] The only problematic aspect of this provision is the requirement that water users must not be in arrears to be eligible for subsidies.[391] Such a provision is likely to exclude indigent communities as they are the ones likely to be saddled with arrears for water services. Chile's Law 18778, Establishing a Subsidy for Payment for the Use of Drinking Water and Sewerage Services (hereinafter referred to as "Law 18778") also contains the problematic provision that requires applicants for subsidies not to be in arrears with payments.[392] Law 18778 establishes a subsidy scheme for household water supplies and sewerage services, in favour of low-income residential users.[393] It also establishes eligibility criteria for subsidy applicants. Applicants for a water subsidy must be unable to pay the full costs of the services.[394] Article 3 of Law 18778 further provides that the applicants must be up to date with their payments for water services to qualify for a water subsidy.[395]

Nepal's National Urban Water Supply and Sanitation Sector Policy[396] is pioneering in the sense that it recognises the importance of adopting social policies to enable water access for the poor, including non-citizens and those without land tenure rights. The lack of citizenship or tenure rights is normally used as a justification for failure to avail water services to poor and marginalised communities. Nepal's Water Supply and Sanitation Policy acknowledges that:

---

[389] Article 60(a).
[390] Article 60(b).
[391] Article 60(c).
[392] See article 1 of Law 18778, Establishing a Subsidy for Payment for the Use of Drinking Water and Sewerage Services. Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 204.
[393] Article 1.
[394] Article 3.
[395] See also article 40 of Brazil's Law of Basic Sanitation Law No 11 445 of 2007 which provides that:
> "[t]he interruption or restriction of water supply due to default to health, educational and collective internment institutions and to low income residential users that benefit from social tariffs shall follow terms and criteria that preserve minimum health conditions for the people affected." Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 204.

[396] See National Urban Water Supply and Sanitation Sector Policy (2009) para 9 3 1. Translated and reported in WASH et al *The Human Right to Safe Drinking Water* 204.

> "As the impact of deficient basic services falls most heavily on the poor, policy will ensure that such groups have access to sustainable basic services at affordable prices and a voice in service-related decision making that will affect them."[397]

It further states that regardless of whether or not such residents have legal citizenship and land tenure rights squatter and slum settlements will be automatically included in service areas to be provided with water services.[398]

The above comparative practices from across the world are in line with the CESCR's approach that water, and water facilities and services, must be affordable for all. The practices showed that different approaches can be developed to structure the pricing for the provision of water services to make them accessible to all without discrimination. This provides a mechanism for ensuring that privatisation of water services does not result in an upsurge in water tariffs making access unaffordable to low-income groups.

6 5 Duty to monitor and regulate as part of the obligation to protect

States have duties to effectively regulate water services providers and ensure that such entities respect and promote the realisation of the right within their constitutional, statutory and contractual mandates.[399] Effective regulation requires independent monitoring of all actors involved in the provision of water services. Regulation entails the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with such rules.[400] Regulation is aimed at protecting water users, investors and the environment.[401] Regulatory activities should therefore focus on protecting water users particularly in cases of disconnections, water quality and monitoring of the water sector.[402] A State must establish a regulatory system for private and public water service providers. Such a regulatory system should require that water services providers ensure physical, affordable and equal access to safe, acceptable and sufficient water. A regulatory mechanism should also enable genuine

[397] See para 9.3.1.
[398] Para 9.3.1.
[399] See Kok "Privatisation" in *Privatisation and Human Rights* 268.
[400] N Prasad "Overview: Social Policies and Private Sector Participation in Water Supply" in N Prasad *Social Policies and Private Sector Participation in Water Supply* (2008) 5.
[401] Special Rapporteur Report para 46.
[402] Para 46.

public participation, independent monitoring, and compliance with norms imposed by the right to water. It is important for regulatory bodies to ensure that water services providers comply with delivery standards imposed by water as a human right. The State would be in violation of its duty to protect where lack of adequate monitoring and regulatory mechanisms results in a non-State actor breaching the right to water.[403]

National legislation and regulations relating to water services should spell out reporting obligations by the water services provider, including periodical reports on contract performance to the contracting authorities and this should also be reflected in the privatisation contract. Appropriate monitoring and oversight, both internally by the corporation and by the contracting authority (and, in some cases, by NGOs) are crucial to promoting accountability. National legislation regulating water services providers should enjoin water services providers to monitor and sanction breaches of the right to water by any of their sub-contractors through an internal compliance mechanism.[404] In a privatisation context this should also be entrenched in a privatisation contract. The State should have trained and experienced contract monitors to effectively monitor contract performance as well as compliance with applicable laws and regulations.[405] The water privatisation contract should also provide penalties for any continued breaches of the right to water such as fines, termination of the contract and exclusion from future bidding processes depending on the gravity of the breach.[406]

Regulation must be independent and shielded from political interference and capture by corporations and other special interests which are the subject of regulation. Regulatory and institutional models may differ. Independent regulatory agencies should be provided for under national legislation rather than relying on the privatisation contract as a tool for regulating the water services provider.[407] The regulatory authority must therefore be empowered to enforce existing regulations and the terms of the privatisation contract.[408] The regulator should also be empowered to sanction the non-compliant service provider through, for instance, imposition of

[403] WASH United et al *The Human Right to Safe Drinking Water* 34.
[404] Cottier 2008 *International Review of the Red Cross* 644.
[405] 644.
[406] 645.
[407] Para 51.
[408] Para 52.

penalties for non-compliance such as fines and the possibility of revocation of the contract.[409]

Tanzania's Energy and Water Utilities Regulatory Authority Act 11 of 2001 (hereinafter referred to as the "The Energy and Utilities Act"),[410] enacted prior to the Dar es Salaam water privatisation discussed above,[411] provides for a regulatory authority, the Energy and Water Utilities Regulatory Authority (hereinafter referred to as "EWURA"),[412] to regulate energy and water utilities. EWURA is responsible for the regulation of the electricity, petroleum, natural gas and water sectors in Tanzania. EWURA's functions include among others, licensing, tariff review, monitoring performance and standards with regard to quality, safety, health and environment. EWURA is also responsible for protecting the interests of consumers and promoting the availability of regulated services to all inhabitants including low income, rural and disadvantaged communities.[413] EWURA was not operational during the tenure of the Dar es Salaam water privatisation scheme.[414] This resulted in the over-stretched Ministry of Water and Livestock Development assuming responsibility for the monitoring and regulation of the privatisation arrangement.[415]

Section 6 of the Energy and Utilities Act empowers EWURA to protect the interests of water users,[416] and to promote the availability of water services to everyone including low income, rural and disadvantaged water users.[417] EWURA also has a promotional role through its mandate to enhance public knowledge, awareness and understanding of the water sector. In this respect EWURA is obliged to enhance public knowledge of the rights and obligations of water users and water services providers. EWURA is mandated to advise the public on ways in which complaints and disputes may be initiated and resolved.[418] EWURA is also empowered to issue, renew and cancel water operating licences.[419] It has the further responsibility to establish standards for the terms and conditions of water services

[409] Para 52.
[410] See Energy and Water Utilities Regulatory Authority Act No 11 of 2001.
[411] See section 3 5 1, chapter 3.
[412] See section 4 of the Energy and Water Utilities Regulatory Authority Act.
[413] For more information on EWURA, see <http://www.ewura.com/overview.html> (accessed 23.08.12).
[414] Section of the Energy and Water Utilities Regulatory Authority Act.
[415] Section 12.
[416] See section 6(b) of the Energy and Water Utilities Act.
[417] Section 6(d).
[418] Section 6e (i) & (ii).
[419] Section 7 (b) (i)-(ii).

provision as well as to regulate water tariffs.[420] The Energy and Utilities Act specifically empowers EWURA to monitor the performance of water services providers in relation to levels of investment, availability, quantity and standard of services. Finally, EWURA is responsible for regulating the cost of services and the efficiency of production and distribution of water services.[421]

The Energy and Utilities Act provides that EWURA shall not perform its functions "in contravention of any International Agreements to which the United Republic is a party."[422] This provision could be interpreted as meaning that the regulatory authority should be guided by Tanzania's human rights obligations under international law, including the right to water.[423] A potentially problematic provision is section 7(4) of the Energy and Utilities Act. It provides that the Minister (responsible for water affairs) "may, from time to time as occasion necessitates it, give to the (regulatory) [a]uthority directions of a specific or general character on specific issues." Provisions similar to the above should be discouraged in legislation creating and empowering regulatory and monitoring entities for water services. It creates a propitious environment for political interference in the activities of the regulatory authority. It is important that the regulatory and monitoring body should be independent to function effectively without arbitrary interference from politicians or other special interests.

One of the key issues raised in the case studies of water privatisation in Tanzania, Bolivia, The Philippines and South Africa discussed in chapter 3 was the paucity of effective monitoring and regulatory mechanisms to exercise oversight over the private providers.[424] In The Philippines there existed a lack of political will to create a powerful regulatory agency which contributed to the partial failure of that privatisation initiative. In South Africa, the local authority in Nelspruit did not have the capacity to effectively regulate the water concession contract hence its failure. In some cases, officials mandated to monitor and regulate the privatisation contract lacked the requisite expertise to do so.[425] In the Dar es Salaam water privatisation

[420] Section 7(c)(v).
[421] Section 7(c) (i)-(iii).
[422] Section 7 (2).
[423] Tanzania is a State Party to the ICESCR which it acceded to on 11th June 1976.
[424] See section 3 5, chapter 3.
[425] See section 3 5 2 5 3, chapter 3.

scheme, the absence of a regulatory and monitoring body meant there was no independent authority to formulate and monitor tariff levels.[426]

An independent regulatory body is particularly important in the case of discontinuation of water services for non-payment. Independent monitoring mechanisms should ensure that the minimum international standards with regard to the right to water are maintained. The regulatory and monitoring mechanisms should have the mandate to scrutinise privatisation contracts to ensure their provisions and implementation do not encroach on the right to water. At the very least, they should mandate water services providers to meet the minimum quantitative or qualitative levels of water provision as elaborated in General Comment 15.[427] Significantly, the regulatory and monitoring mechanisms should put in place strict water tariff control measures to prevent water services providers from charging exorbitant tariffs thereby impeding the economic accessibility of water.[428]

6 6 Duty to remedy

The substantive guarantee of the right to water, as pointed above, is incomplete unless the beneficiaries of the right are provided with adequate means of reparation should the right be infringed.[429] Access to remedies is critical because the right to water may not mean much in the absence of effective remedies for its enforcement.[430] Accountability and access to effective remedies will ensure that water service providers are held accountable for deteriorating services, unmet performance standards, unjustified tariff increases, inadequate social policies or other breaches.[431] An effective complaints mechanism is crucial to the implementation of the human right to water. It is an effective tool to ensure that a remedial framework is available against abuse of the right to water by water services providers especially in a privatisation scenario.[432]

Accountability can be achieved through judicial, quasi-judicial, administrative, political and social mechanisms. Both States and corporations are responsible for

[426] See section 3 5 1 2, chapter 3.
[427] Kok "Privatisation" in *Privatisation and Human Rights* 271.
[428] 286.
[429] For further discussion of the duty to remedy, see section 5 3 2 4, chapter 5.
[430] S Deva "Guiding Principles on Business and Human Rights: Implications for Companies" (2012) 9 *European Company Law* 101 104.
[431] Special Rapporteur Report para 56.
[432] See section 5 3 2, section 5.

ensuring an adequate remedy when abuses occur.[433] Complaint mechanisms should be based at both the level of the service provider or of the State.[434] State provided remedies are important in case of corporate non-compliance with the standards imposed by water. Non-State service providers should be under a duty not to obstruct access to State-based accountability mechanisms, including court proceedings.[435] State based mechanisms are essential, since an effective remedy might not be provided by the private water services provider to individuals who complain that their right to water has been infringed.[436]

6 6 1 Complaints mechanisms: State obligations

The CESCR explained in General Comment 15 that "victims of violations of the right to water should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition."[437] States must take judicial, administrative, legislative or other appropriate steps to ensure that victims of such violations have access to effective remedies as illustrated in the accountability model in Figure 1 below.[438] States are obliged to establish effective judicial as well as non-judicial mechanisms to address corporate human rights abuses of the right to water.[439] The remedies must be accessible, predictable, equitable and transparent.[440] In this regard, States should take steps to overcome legal, practical or procedural barriers that could impede access to effective remedies. Potential barriers could be in the form of such concepts as *forum non conveniens*, corporations' misuse of the principle of separate legal personality, lack of legal representation, and non-availability of class actions in civil suits.[441]

State-based complaints mechanisms can be in the form of judicial and non-judicial complaints mechanisms. In the absence of alternative remedies, States should ensure that there are no barriers that prevent aggrieved individuals or communities from accessing courts in situations where judicial recourse is an

[433] See UN *Protect, Respect and Remedy Framework* paras 26, 82-99.
[434] Special Rapporteur Report para 58.
[435] Para 59.
[436] Para 59.
[437] CESCR *General Comment 15* (2002) para 55.
[438] UN *Guiding Principles* principle 25.
[439] Principles 26 and 27.
[440] Principle 31.
[441] See Principle 26 and Commentary.

essential part of accessing remedies.[442] States should also ensure that access to effective judicial remedies is not prevented by corruption of the judicial system, and that courts are independent of economic or political pressures from other entities, including water services providers.[443] Apart from judicial mechanisms, States should provide effective and appropriate non-judicial complaints mechanisms as part of a comprehensive State-based system for the remedy of breaches to the right to water.[444] It is important to note that non-judicial mechanisms could play an essential role in complementing and supplementing judicial mechanisms in protecting the right to water. It is possible that in some cases, judicial remedies may not always be required nor the favoured approach for all claimants.[445] Ensuring access to remedies requires also that States facilitate public awareness and understanding of complaints mechanisms, how they can be accessed, and any available legal or financial support to access such remedies.[446]

Complaints against a water services provider, depending on the domestic constitutional and legislative framework as well as the relevant contractual provisions, can be submitted to ombudsman offices, human rights commissions or the judiciary. Such bodies can ensure adequate redress for those whose right to water have been infringed by the water services providers. These bodies serve different functions for the purposes of handling complaints. Human rights commissions and ombudsman offices are normally able to handle complaints faster and cheaper than, for example, the judiciary though much depends on the constitutional powers and legislative frameworks in each jurisdiction. The only drawback is that decisions by State-based non-judicial bodies are not always binding and may not have the necessary powers to grant effective relief. In such cases, the judiciary may be the most appropriate entity to handle complaints and award remedies where there is systematic discrimination against individuals or groups affecting their right to water. The judiciary can also, at the level of the court system, demand the State to revise its water programmes and plans of action and create substantial change and impose penalties.[447]

---

[442] Principle 26.
[443] Principle 26.
[444] Principle 27.
[445] Principle 27.
[446] Principle 25.
[447] WASH United et al *The Human Right to Safe Drinking Water* 33.

6 6 2 Complaints mechanism: responsibilities of water services providers

The importance of corporate internal complaints mechanisms to provide effective remedies was discussed above.[448] The water services provider must provide operational-level grievance mechanisms to remedy any breach of the right to water. The importance of complaints mechanisms located in the corporation is that they potentially provide early-stage recourse and resolution of any disputes. Non-State-based complaints mechanisms may encompass those mechanisms administered by a water services provider with other stakeholders, by an industry association or a multi-stakeholder group.[449]

Internal grievance mechanisms provided by the water services providers are an important first step, but may not settle the issue conclusively in some cases. It is therefore important that in contentious cases, settlement of any dispute via an independent institution such as the judiciary is required.[450] A mechanism must be in place to facilitate the filing of complaints.[451] Individuals and communities must, for instance, be able to bring up potential discrimination cases in the targeting of water subsidies.[452] Individuals and communities whose right to water has been infringed should receive adequate reparation, including restitution, compensation, satisfaction and/or guarantees of non-repetition.[453] While internal remedies will be adequate in many cases, a right of judicial appeal as a last resort is often appropriate and sometimes indispensable.[454]

6 6 3 Complaints mechanisms: Good practices

Tanzania's Energy and Utilities Act provides for a complaints mechanism against suppliers of water services. The Energy and Utilities Act, if effectively implemented, would constitute a good practice.[455] The Energy and Utilities Act provides for the submission of complaints against a water services provider to EWURA. EWURA is obliged, after satisfying itself that the complainant has an interest in the complaint and that the complaint is not frivolous or vexatious, to investigate the matter.[456]

---

[448] See 5 3 2 5, chapter 5.
[449] UN Guiding Principle 28.
[450] Special Rapporteur Report para Para 59.
[451] See 5 3 2 5, chapter 5.
[452] Para 60.
[453] Para 60.
[454] Para 60.
[455] See sections 34-38 of the Energy and Utilities Act.
[456] 34(2).

EWURA has the option of referring the complaint to the water services provider should its investigations reveal that the water services provider has not properly considered the complainant's complaint. The regulatory authority may also make representations to the water services provider on behalf of the complainant.[457]

The Energy and Utilities Act further provides for procedures in the adjudication of a complaint. If a complaint is not resolved to the satisfaction of a complainant within sixty days after the complaint was filed with EWURA, the complainant may request the regulatory authority to refer the complaint to a Division of the Authority (an organ of EWURA) for a decision. [458]The regulatory authority is obliged to establish a unit whose responsibility it is to receive and follow up on complaints from water users.[459] The relevant Division of the Authority is required to investigate all complaints and attempt to resolve the complaints amicably. In the event that a complaint cannot be resolved amicably within thirty to sixty days, the Division of the Authority concerned is required to present its findings and recommendations for action to EWURA.[460] The remedies that may be handed down by EWURA include an order requiring a party to pay money or requiring the water services provider to supply water services to the complainant. Alternatively, it may dismiss the complaint.[461] It is also significant to note that orders handed down by the regulatory authority are enforceable as orders of the High Court.[462]

Namibia's Water Resources Management Act No 24 of 2004 (hereinafter referred to as the "Water Resources Management Act") provides for the establishment of an administrative mechanism to handle complaints regarding the adequacy and reliability of water supply services.[463] In Colombia, Law 142 Establishing the Regime for Public Household Services (hereinafter referred to as

[457] 34(3) & (4).
[458] See section 21.
[459] 34(7).
[460] 34(8).
[461] 35(1)(a)-(e).
[462] 35(2).
[463] See section 26(2)(d) of the Water Resources Management Act No 24 of 2004. See also Costa Rica's Law on the Regulating Authority for Public Services, Law 7593 of 9 August 1996 which provides in article 27 for a regulatory authority mandated to "manage, investigate and resolve... any complaint regarding the provision of the public services regulated in this law." Honduras' Decree No 118 of 2003 provides in article 25(3) that water users must "be heard by the provider regarding inquiries and complaints formulated when the quality of water and of the services should be worse than determined, or if they should deteriorate to whatever kind of irregular conduct or omission that affects or damages their rights." See Framework Law for the Drinking Water and Sanitation Sector Decree No 118 of 2003. Translated and reported in WASH United et al *The Human Right to Safe Drinking Water* 190.

"Law 142") provides for the rights of users of public services such as water to present "company petitions, complaints, or appeals relating to the contract of public services."[464] Furthermore, Law 142 enjoins all the public utility providers to establish an "office for petitions, complaints, and appeals."[465] Such an office is obliged to handle petitions or claims and appeals presented by water users. Law 142 further provides that such complaints offices must record and keep a detailed account of all petitions and appeals presented as well as of the steps or remedies awarded. The law provides that the petitions and appeals must be processed in accordance with norms in effect concerning the right to petition.[466] Law 142 further provides for the award of remedies to the user such as reparations, whichever is suitable in the circumstances.[467]

In Guyana, the Public Utilities Commission Act Chapter 25:01 of 1999 (hereinafter referred to as the "Public Utilities Commission Act") provides for a complaints mechanism. Section 25 requires every water services provider to maintain its property and equipment in such condition as to enable it to provide water services.[468] A water services provider is further enjoined to make every reasonable effort to provide water services in a non-discriminatory manner, and to meet the threshold of safety, adequacy and efficiency.[469] The Public Utilities Commission Act provides for the submission of any complaints against providers of public utilities such as water services providers to the Public Utilities Commission. Where the Public Utilities Commission, upon hearing a complaint finds that the service provided by a public utility is not in accordance with the provisions of section 25, the Public Utilities Commission must prescribe the reasonable service to be provided by the public utility. The Public Utilities Commission may direct the public utility to pay to any consumer compensation for loss or damage suffered.[470] The Public Utilities Commission Act also provides that any complaint in terms of this law may be made by the Minister responsible for public utilities or any person (including any other public utility) having an interest in the subject matter. The filing of a complaint is thus not limited to the victim of infringement of any water related rights. The Public Utilities

[464] See article 142 of Law 142 Establishing the Regime for Public Household Services of 11 July 1994. Translated and reported in WASH United et al *The Human Right to Safe Drinking Water* 190.
[465] See article 153.
[466] See article 153.
[467] Article 137.
[468] See section 25 of the Public Utilities Commission Act No 10 of 1999.
[469] See section 25(1).
[470] Section 26.

Commission Act also provides the possibility of a class action. It provides the Public Utilities Commission with the discretion to permit one or more persons to make a complaint against a public utility, on behalf of a class of users of such a service.[471] Furthermore, hearings before the Public Utilities Commission are public. Complainants are entitled to be heard in person or represented by a legal practitioner.[472] The Public Utilities Commission is obliged to hand down an order in writing which shall state the time within which the order is to be complied with.[473]

In Namibia, the Water Resources Management Act requires the Minister responsible for water services to ensure that all Namibians are provided with an affordable and a reliable water supply that is adequate for basic human needs.[474] The Water Resources Management Act further enjoins the Minister responsible for water resources to ensure the adequacy, affordability and reliability of water supply by water services providers.[475] The Minister is required to develop reliable standards of performance and facilities that are applicable to any entity that supplies water for domestic, commercial, industrial or agricultural use.[476] The Minister must also periodically review the performance of every person who supplies water for domestic, commercial, industrial or agricultural use to evaluate compliance with the standards of performance.[477] The Minister is further required to take corrective action with regard to any water services provider that fails to meet standards of performance. Such remedial measures may include the secondment of managerial or technical personnel, the amendment, suspension or cancellation of any relevant licence to abstract and use water.[478] Finally, the Water Resources Management Act enjoins the Minister to establish an administrative mechanism that will enable water users to be heard regarding the adequacy and reliability of their water supply.[479]

The importance of grievance and enforcement mechanisms as part of realising the right to water cannot be over-emphasised. As illustrated from a discussion of practices from different jurisdictions, such mechanisms are important whether or not provision of water services have been privatised as both actors are

[471] Section 55.
[472] Section 58.
[473] Section 59(1).
[474] Article 26(2) of the Water Resources Management Act No 24 of 2004.
[475] Article 26(2)(a).
[476] Article 26(2)(b).
[477] Article 26(2)(b).
[478] Article 26(2)(c).
[479] Article 26(2)(d).

capable of infringing on the right to water. Such complaints mechanisms provide a framework for holding water services providers accountable for any deteriorating services, unmet performance standards, and unjustified tariff increases. Grievance mechanisms are even more important where water services have been privatised to ensure the accountability of the private service provider with the norms imposed by the right to water.

Complaints mechanisms, whether State - or corporate-based, must be accessible, predictable and provide for transparent procedures. It is therefore important that State-based judicial and non-judicial mechanisms should complement operational-level corporate grievance mechanisms to protect water users against infringement of their right to water and provide remedies where the right has been infringed. The importance of the State's sanctioning power lurking in the background to enhance the effectiveness of corporate level mechanisms was explored in chapter 5.[480] The threat of such intervention reinforces the effectiveness of such corporate level grievance mechanisms.

6 7 Conclusion

This chapter proposed an accountability model incorporating good practices from different jurisdictions. The accountability model clearly illustrates that States and non-State actors involved in the provision of water services have clearly designated roles and responsibilities consistent with the human right to water as illustrated in Figure 1 below.

The chapter thus analysed and discussed good practices from different jurisdictions such as legal frameworks, national policy initiatives, strategies, plans of action, regulatory systems and institutions employed by States and other actors consistent with the norms imposed by the right to water. An important prong of the accountability model is the State's duty to protect against human rights abuses of the right to water by third parties, including corporations, through appropriate policies, regulation, and adjudication. According to the accountability model, the State has a duty to prevent, investigate, and punish abuse of the right to water and provide access to appropriate remedies. The accountability model also emphasises the

[480] See B Hepple "Negotiating Social Change in the Shadow of the Law" (2012) 159 *The South African Law Journal* 248 255. See section 5 3 2 2, chapter 5.

responsibility of water services providers, including non-State actors, to respect the right to water. The duty to respect the right to water has both positive and negative dimensions. The duty to respect is broad enough to proscribe the adoption of policies that result in denial of access by poor communities to the right, rather than simply prohibiting interference with existing access to water services. The accountability model discussed and analysed procedural elements of due diligence in relation to water privatisation, focusing on the decision to privatise provision of water services, the water privatisation contract, the operation of water services and the provision of effective complaints mechanisms. The accountability model also emphasised the responsibilities of both the State and the water service provider to undertake human rights due diligence at every stage of the water privatisation process to become aware of the actual and potential impact of their policies and actions on the right to water.

An important element of the privatisation process is the need to consult and enable participation of individuals and groups affected by the water privatisation process. In terms of the accountability model developed in this chapter, such consultation and participation starts during the initial design phase and continues right through construction, implementation and compliance monitoring. A credible community consultation and participatory process must be based on prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information to the affected community.

The accountability model demonstrated that both the State and the private water provider have an obligation to ensure equal access to full and transparent information concerning water issues held by public authorities or third parties.[481] Such information must be published in different languages and through multiple media (written, spoken) to ensure that everybody is able to access public information as equitably as possible.

The accountability model emphasised the State's duty to prevent, investigate, and punish abuse of the right to water through adoption of appropriate policies, regulations and adjudication mechanisms.[482] Access to remedies is critical because the right to water may not mean much in the absence of effective remedies for its

[481] See section 6 3 4, chapter 6 for further discussion.
[482] See 6 6 1, chapter 6.

enforcement.[483] An effective complaints mechanism is key to the implementation of the human right to water. The accountability model emphasises the need for victims of water rights abuse to access effective remedies, both judicial and non-judicial. Such effective remedies should be available, both at the State level and at the corporate level. Additionally, the accountability model emphasised that the State and the water services provider have a responsibility to disseminate any relevant information in their possession relating to the privatisation agreement. This would ensure that individuals and groups are given full and equal access to information concerning water issues held by public authorities or third parties in the formulation and implementation of national water strategies and plans.

This chapter elaborated on how the normative standards imposed by the right to water can be implemented in practice by discussing model legislation and good practices from across the world. It sought to illustrate how these normative commitments in respect of the right to water are "becoming reality for the excluded, the forgotten and the voiceless."[484] The accountability model is thus an interrelated and dynamic system of preventative and remedial measures involving both the States and corporations through "differentiated but complementary responsibilities."[485] The following chapter summarises and concludes this dissertation.

[483] The CESCR has emphasised that any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels. See CESCR *General Comment 15* (2002) para 55. For further discussion see section 6 6, chapter 6 for further discussion.
[484] De Albuquerque & Roaf *On Right Track* 7.
[485] See UN *Protect, Respect and Remedy Framework* para 9.

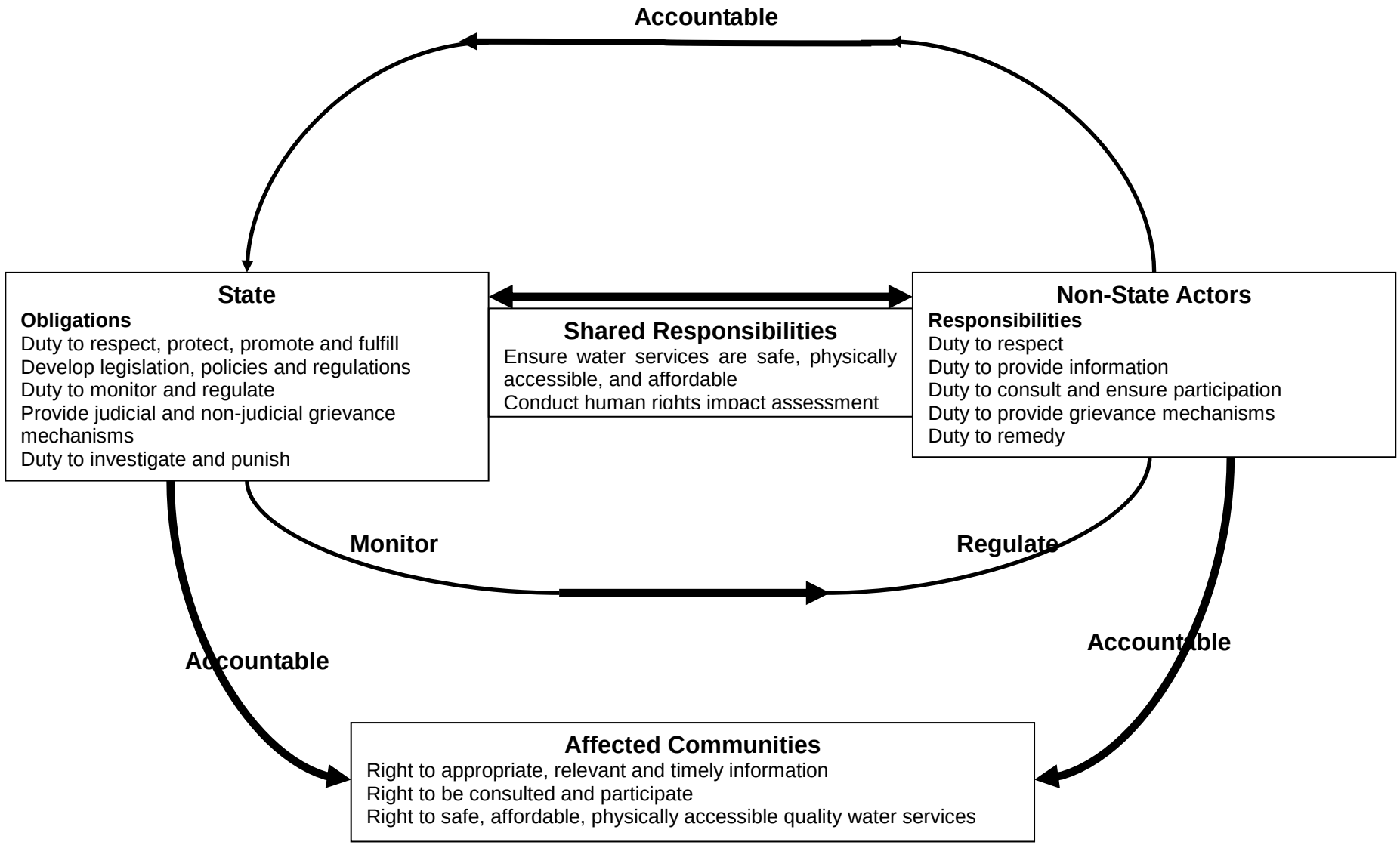


Figure 1 Accountability Model

Chapter 7

Conclusion

Water is of fundamental importance as a basic need and a human right for living a life in dignity. The universal enjoyment of access to safe water is not only a technical, social or economic issue, but a human right which must be respected, protected, promoted and fulfilled. Yet the current statistics are sobering.[1] As noted in chapter 1, close to a billion people lack access to safe water for personal and domestic use.[2] This leads to a huge global burden of disease and death from water-related diseases. Lack of access to safe water has been tied to sixty per cent of the world's illnesses. Water related diseases such as cholera, typhoid and diarrhoea are some of the leading causes of death in developing countries. This has catastrophic implications for health, education, personal security, livelihoods as well as the realisation of other human rights. Furthermore, lack of access to safe water has been considered as one of the greatest obstacles to development. Access to water is also essential for food security, economic development and for securing livelihoods.[3] In addition to the more apparent consequences that result from lack of access to an adequate supply of safe water highlighted above, there are secondary non-obvious effects such as reducing school attendance or impact on communities or individuals' ability to earn a living through subsistence farming or other water-dependent livelihoods.

A noticeable development, promoted by multilateral lending and donor institutions, was the conception of water as an economic good susceptible to commodification and corporatisation.[4] The past two decades have witnessed a trend in all the regions of the world to roll back the State and increasingly rely on the market as the distributor of basic goods and services. The State is no longer considered as the provider, but the regulator of many social services. Water privatisation has been promoted as an urgently necessary antidote to ameliorate the world's water crisis. The provision of water supply services by private corporations increased rapidly around the world from the 1990s onwards. Water privatisation was

[1] See introduction to chapter 1 for a discussion of the global statistics relating to people without access to safe water and sanitation.
[2] See introduction to chapter 1.
[3] 2.
[4] See section 2 3, chapter 2. See further 3 2, chapter 3.

actively supported by the World Bank, the International Monetary Fund and development agencies as the panacea to the ills that plague the water sector.[5] In the water services sector, it was shown that the concept of water as an economic good and the principle of full cost recovery have catalysed the privatisation of water services provision across the world. Private enterprises are taking control of the management, operation and ownership of public water systems. This has resulted in water increasingly becoming subject to the rules and powers of markets and prices have been set for water services previously provided for free.[6]

Chapter 2 illustrated that the ideological, political and philosophical debates surrounding the development of the concept of water as an economic good emboldened a counter- movement for the explicit recognition of water as a human right.[7] Opponents of privatisation argue that water is a human right, a public trust and a commons hence the privatisation call is merely a mask to conceal the appropriation of water from the public domain into the private domain.[8] Further, the commodification of water would lead to lack of access to water services, especially by the poor and vulnerable members of society.[9]

Chapter 2 demonstrated that one of the most significant developments in the last decade is the rise of a human rights oriented approach to ameliorating the global water crisis. The conception of water as either a human right on the one hand or an economic good on the other was one of the major impetuses towards the emergence of the right to water. As demonstrated in chapter 2, the rise of a human rights approach has been substantially aided by watershed normative developments in international human rights law.[10] The current global water crisis highlighted above and the consequent inclusion of water in the United Nations agenda and other multilateral fora precipitated the call for the recognition of a human right to water. This dissertation traced the recognition of the right to water in international treaties, regional human rights treaties in Africa, Europe, Asia and the Americas, as well as in national constitutions and laws of a number of countries.[11]

---

[5] See in this regard sections 3 2 and 3 4, chapter 3.
[6] See section 3 2 6, chapter 3.
[7] See in this regard section 2 3, chapter 2.
[8] K Bakker *Privatising Water: Governance Failure and the World's Urban Water Crisis* (2010) 215.
[9] See sections 2 2 and 2 3, chapter 2.
[10] See section 2 5 1 – 2 5 6, chapter 2.
[11] For a discussion of the recognition of the right to water under regional systems for the protection of human rights as well as under domestic legal systems, see sections 2 5 4 and 2 5 5 1, chapter 2.

This dissertation showed that the right to water is explicitly protected in certain international human rights instruments such as the Convention on the Elimination of of all Forms of Discrimination Against Women,[12] the Convention on the Rights of the Child and the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities.[13] It was argued that the right to water is also implicitly protected in the provisions of the Universal Declaration on Human Rights,[14] the International Covenant on Economic, Social and Cultural Rights[15] (hereinafter referred to as the "ICESCR") and the International Covenant on Civil and Political Rights.[16] Moreover, the right of access to water is an indispensable component to an adequate standard of living.[17] There is no doubt that access to basic supplies of safe and adequate water is a precondition for the sustenance of human life itself. Furthermore, the realisation of the right to health and a healthy environment requires access to an adequate supply of safe and potable water, rendering water a core component of the right to health. Similarly, safe and clean water is a fundamental component of the right to adequate housing. Denial of a safe and clean water supply would render a dwelling inhabitable. Water is indispensable for the preparation of food, and drinking water, as highlighted in chapter 2, is regarded as liquid food.[18]

Chapter 2 further demonstrated how the Committee on Economic, Social and Cultural Rights (hereinafter referred to as the "CESCR") took the initiative by construing a human right to water from the existing provisions of the ICESCR through the ground-breaking General Comment 15.[19] This standard-setting instrument marked a decisive shift toward an elaboration of the legal basis of the right to water, its normative content, and the obligations imposed by this right. General Comment 15 marked the explicit affirmation by a United Nations (hereinafter referred to as the "UN") treaty supervisory body of the existence of an independent human right to water. It also provided the impetus for the explicit and implicit recognition of the right

[12] International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (1969).
[13] International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (2006) UN Doc A/61/49.
[14] Universal Declaration of Human Rights (1948) UN Doc A/810.
[15] International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316.
[16] International Covenant on Civil and Political Rights (1966) UN Doc A/6316.
[17] See legal basis for the right to water discussed in section 2 5, chapter 2.
[18] See section 2 5 2 4, chapter 2.
[19] See UN Committee on Economic, Social and Cultural Rights *General Comment No 15, Right to Water* (2002) UN Doc E/C.12/2002/11. See section 2 5 2 2, chapter 2 for a discussion of General Comment 15.

to water in a substantial number of national constitutions and laws from all over the world and across legal cultures.[20]

Interdependence of all human rights constitutes a key theoretical underpinning for the recognition of a right to water and this is a major theoretical perspective which I draw on in chapter 2.[21] The right to water should be understood within the realm of the interrelatedness and interdependent nature of all human rights, consisting of both organic and related interdependence.[22] This study applied the organic and related interdependent framework in the understanding of the interdependence of human rights as elaborated by Craig Scott.[23] This dissertation illustrated that the absence of an explicit reference to a right to water in the ICESCR or the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR") is not a sufficient argument to deny access to water the status of an independent human right.[24] The CESCR derived the right to water from articles 11 and 12 in the ICESCR. The CESCR supported this derived right through an analysis of the centrality and necessity of water to other rights under the ICESCR as well as other instruments under the International Bill of Rights. The CESCR thus emphasised the interrelationship between the right to water and a range of other human rights.[25]

This dissertation demonstrated the emergence of the right of access to water is in the process of emerging as a norm of customary international law. There is widespread recognition of the right to water at the national level through national constitutions and domestic legislation, regulations and policies. Such developments have implications for the emergence of the right to water as a customary international law norm. Although it is early to positively assert that the right to water has attained the status of customary international law, it can be argued that the right to water is now customary law in *statu nascendi*.[26]

---

[20] See section 2 5 2 2, chapter 2.
[21] See section 2 5 2 1, chapter 2 for further discussion on the interdependent and interrelated nature of all human rights.
[22]The significance of the related interdependent framework in the understanding of the interdependence of human rights is that protecting one right indirectly results in the protection of another right. See CM Scott "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International" (1989) 27 *Osgoode Hall Law Journal* 769 779-786.
[23] 779-786. See also section 2 5 2 1, chapter 2
[24] Riedel "The Human Right to Water and General Comment Number 15" in Riedel & Rothen (eds) (2004) *The Human Right to Water* 19 24. For a discussion of the interdependence of all human rights, see section 2 5 2 1, chapter 2.
[25] See section 2 5 2 4, chapter 2.
[26] See IT Winkler *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (2012) 277.

As indicated in chapter 2, some scholars have disputed the existence of a right to water under international human rights law.[27] The main thrust of their objection is the derivation of the right to water from related rights. To such scholars, such an approach is tantamount to rewriting the provisions of the treaties, and part of a larger revisionist programme.[28] This dissertation argued that such assertions cannot be sustained. A proper interpretation of the International Bill of Human Rights means that it is perfectly legitimate and permissible to derive a human right to water from related rights.[29] Any legal instrument must be interpreted in accordance with its object, purpose and context.[30] The object of a treaty, purpose and context are teleological elements which militate against a narrow literal interpretation of treaty texts. In the context of international law the interpretative criteria enjoin a purposive approach that takes account of the on-going evolution of international law.[31] The recognition of water as an international human rights norm is consistent with a teleogical approach to treaty interpretation, and the principle of the interdependence, interrelatedness and indivisibility of all human rights. It is also in sync with emerging State practice and the leading literature in the field.[32]

A strong and persuasive case can therefore be made for the status of water as a norm of international human rights law. This dissertation has further argued that conceiving of water as a human right has political and strategic advantages in advancing the goal of providing safe water to everybody, particularly disadvantaged communities. A human rights approach contributes to the goal of universal access to water by clarifying that water is a legal entitlement rather than a commodity provided on the basis of charity or purely market principles.[33] Clarifying and further developing the theoretical underpinnings of the right to water can help States, non-State actors and communities affected by privatisation arrangements to evaluate whether the proposed arrangements will advance the progressive realisation of the right.[34] Further elaboration of the right to water with regard to privatisation could help ensure

[27] See section 2 7, chapter 2.
[28] M Dennis & D Stewart "Justiciability of Economic, Social and Cultural Rights: Should there be an International claims Mechanism to Adjudicate the Rights to Food, Water and Health?" (2004) 98 *American Journal of International Law* 462 493-494 .
[29] M Langford "Ambition that Overleaps Itself? A Response to Stephen Tully's critique of the General Comment on the Right to Water" (2006) 24 *Netherlands Quarterly of Human Rights* 433 435.
[30] 435.
[31] 435.
[32] See section 2 7, chapter 2.
[33] Winkler *The Human Right to Water* 282.
[34] See introduction to chapter 1.

that water privatisation arrangements will be guided by the normative standards imposed by the right to water. This would help States and non-State actors use human rights standards to ensure that privatisation initiatives do not underpin the normative objectives of water as a human right.[35]

Privatisation, as demonstrated in chapter 3, can take a variety of forms.[36] In some instances, privatisation represents State withdrawal from a field of activity or from responsibility for providing services. This might be the case, as for example where a State sells off a public entity to a private entity. The other, more common model of privatisation is when the State engages private entities to provide services to the public on the State's behalf.[37] This form of privatisation is normally characterised by government agencies giving private entities significant control over, and responsibility for, the provision of basic services ordinarily provided by the State. This results in private entities exercising enormous control over the public's access to basic goods and services ordinarily provided by the State.[38] In that sense, privatisation often effectively serves to delegate government responsibilities to private entities. Proponents of privatisation, as demonstrated in this dissertation, often use a relatively constrained definition, reserving the term privatisation for the outright sale of State assets to the private sector.[39] This dissertation demonstrated that privatisation should be understood as a change in the role and responsibilities of the State rather than simply a change of ownership.[40] This dissertation adopted a broad understanding of privatisation rather than limiting the concept to a complete transfer of assets from the public to the private sector.[41] This dissertation used the term privatisation to denote the entire gamut of activities involving the participation of private entities in the provision of public goods, either on behalf of, or in cooperation with the State or its agencies. This may take the form of concessions, management and service contracts, consulting services, and public-private partnerships with State agencies.[42]

---

[35] M Williams "Privatisation and the Human Right to Water: Challenges for the New Century" (2006-2007) 28 *Michigan Journal of International Law* 467 504.
[36] See section 3 2 1, chapter 3.
[37] For further discussion, see section 3 2 1, chapter 3.
[38] See 3 2 1, chapter 3.
[39] For a discussion on the narrow definition of privatisation, see section 3 2 2, chapter 3.
[40] For further discussion on a broad understanding of privatisation, see section 3 2 2, chapter 3.
[41] See section 3 2 2, chapter 3.
[42] For further discussion on the forms of privatisation, see section 3 3, chapter 3.

Furthermore, this dissertation highlighted the close connection between privatisation and corporatisation.[43] Corporatisation is the integration of market principles such as full cost recovery in the operation and management of public entities involved in service provision.[44] The main reason for corporatising a public service is to infuse market principles in its operations. Corporatisation, together with privatisation, is increasingly being employed in the delivery of basic services such as water.[45] In some cases, corporatisation can be a stepping-stone towards full privatisation of the service in question. This dissertation has demonstrated that the implications of privatisation of water services are relevant, and have implications for corporatised entities.[46] Most of the human rights concerns raised by other forms of privatisation are similar to those that arise in the context of corporatisation of a service such as water provision.[47]

Chapter 3 highlighted the global increase in privatisation of human rights sensitive services such as water provision. In the water services sector, it has been shown that the concept of water as an economic good and the principle of full cost recovery have catalysed the privatisation of water services provision across the world. Private enterprises are taking control of the management, operation and ownership of public water systems. The result is that water has increasingly become subject to the rules and powers of markets and prices have been set for water services previously provided for free or at a subsidised cost.

In line with the position adopted by various treaty bodies such as the CESCR, the dissertation adopted the position that it is permissible within the human rights framework for private entities to be involved in the provision of human rights sensitive services such as water.[48] Privatisation of water service provision does not *per se* constitute a violation of the right to water. However, circumstances in which privatisation is carried out might give rise to substantive and procedural breaches of the right to water.[49] The utilisation of privatisation as a water delivery mechanism

[43] See 3 2 3, chapter 3.
[44] DM Chirwa "Privatisation of Water in Southern Africa: A Human Rights Perspective" (2004) 4 *African Human Rights Law Journal* 218 221.
[45] See section 3 2 3, chapter 3 for further discussion.
[46] See section 4 5 1 3 for a discussion of the Mazibuko case on the implications of corporatisation of water services in Johannesburg on access to water for poor communities.
[47] See section 3 2 2, chapter 3.
[48] See section 3 6, chapter 3 for an in-depth analysis of privatisation from a human rights perspective.
[49] V Petrova "At the Frontiers of the Rush for Blue Gold: Water Privatisation and the Human Right to Water" (2006) 31 *Brooklyn Journal of International Law* 557 609.

must, therefore, go hand in hand with developing mechanisms for holding both State and non-State actors accountable for the human right to water.[50]

Chapter 3 demonstrated that States, and institutions such as the World Bank and other international financial institutions as well as private water providers have put insufficient effort to assess the risks and limitations of water privatisation. This has resulted in a failure to put in place standards and measures imposed by human rights norms to govern privatisation processes.[51] Four select examples of water privatisation from Tanzania, Bolivia, the Philippines and South Africa were discussed with a view to illustrating the potential impact of privatisation on the human right to water. The four case studies reveal the potentially deleterious effects of privatisation of water services if the standards imposed by the right to water, both substantive and procedural, are not taken into account.[52] In the Cochabamba privatisation for instance, no opportunity was afforded to those affected by the water privatisation scheme to incorporate the concerns of the affected communities. In Dar es Salaam, the privatisation process was conceived and implemented by national and international technocrats without any public consultation and participation of local communities.[53] The lack of public consultation and participation in the privatisation process made it impossible for the public to determine whether the privatisation process was in the public interest. Another key issue raised in the above cases of privatisation is the paucity of effective regulatory and monitoring mechanisms to ensure realisation of the right to water notwithstanding the privatisation of water delivery services. This dissertation argued that for a State to effectively discharge its protective mandate where water services have been privatised, it must put in place a regulatory and monitoring mechanism to monitor the performance of water services providers.[54]

Some of the matters of public interest in any water privatisation project include the cost of and quality of water services, physical accessibility of water sources, security issues, environmental impacts, and the potential closure of public spaces if

---

[50] See chapter 5.
[51] See in particular the case studies on the impact of privatisation on the right to water discussed in section 3 5, chapter 3.
[52] See chapter 3, section 3 5.
[53] See 3 5 4 2 and 3 5 1 2, chapter 3. See also M McFarland Sanchez-Moreno & T Higgins "No Recourse: Transnational Corporations and the Protection of ECOSOC Rights in Bolivia" 2004 (27) *Fordham International Law Journal* 1663 1747.
[54] For a discussion of the State duty to protect in the context of privatisation of water services, see section 3 6, chapter 3, section 4 2 2, chapter 4 and section 6 2, chapter 6.

the privatisation initiative is not properly designed. A human rights approach to water privatisation requires that privatisation of water services have as its key objective the realisation of the right to water, especially by those currently unserved or underserved.[55] Significantly, any water privatisation initiative should be guided by the principles of indivisibility and interdependence of all human rights, including the right to water.[56]

Chapter 4 of this dissertation sought to analyse the nature of the obligations imposed on the State by the right to water, focusing particularly in the context of privatisation of water services. A key development in international human rights theory and practice from the early 1980s was the development of typologies to elaborate the nature of obligations imposed by human rights instruments on States discussed and analysed in chapter 4.[57] This dissertation demonstrated that all human rights, including the right to water, impose a spectrum of duties, and that the duty applicable in a particular situation depends on a contextual evaluation of the case.[58] Chapter 4 provided a detailed analysis of the obligations imposed by the right to water on State actors. Adopting the quartet of obligations framework, this dissertation argued that the human right to water imposes four types of obligations on the State, the obligations to respect, the obligations to protect, obligations to fulfill and the obligations to promote the right to water.

The use of typologies as an analytical tool has contributed immensely to the further clarification of the obligations that the right to water imposes on States.[59] This dissertation showed that using the typologies of State obligations as an analytical tool has helped to dispel the notion that there are significant differences in the nature of various human rights.[60] It was argued that, the distinction should rather be between different levels of duties applicable in a particular case. Such an analytic model provides a better understanding of the scope and content of the right to water and

[55] See section 3 6, chapter 3.
[56] See section 3 6, chapter 3.
[57] For a discussion of the origin and development of typologies of State obligations, see 4 1 1, chapter 4.
[58] See sections 4 1 - 4 3, chapter 4 for an in-depth discussion of the typologies approach in relation to the right to water.
[59] See MM Sepulveda *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 12 & 172.
[60] See section 4 1 2, chapter 4.

helps to safeguard the right, whether water is provided by the State or a private operator.[61]

The State's duty to protect human rights against violations by private actors is an integral component of State duties under human rights treaties and customary international law. Drawing from General Comment 15 on the right to water and the jurisprudence of international, regional and national courts, chapter 4 highlighted the duties the right to water imposes on the State in the context of involving non-State actors in the provision of water services.[62] The dissertation argued that involvement of non-State actors in the provision of water services necessarily implies that a shift in emphasis takes place.[63] It was argued that, in the context of privatisation schemes, the State's obligation to protect assumes greater significance.[64] The State has an obligation imposed by the right to water to protect individuals and communities from the deleterious acts of non-State actors. States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water.[65] Any arbitrary or unjustified disconnection from water services and discriminatory or unaffordable increases in the price of water constitute violations of the State's obligation to ensure the realisation of the right to water.[66] A State may be liable for a breach of its obligations should it fail to take appropriate steps to prevent, investigate, punish and remedy breach of the right to water by non-State actors.[67] To fulfill this protective mandate the State must adopt legislative and other measures to regulate and monitor the conduct of non-State actors involved in the provision of water services.[68] Significantly, the State is further obliged to take measures aimed at ensuring access by everyone to water for personal and domestic uses. This obligation entails the requirement to adopt special measures in favour of disadvantaged and vulnerable groups such as subsidies, cross-subsidies, and other direct measures of assistance to ensure water access.[69] Such safeguards are very

[61] See section 4 1 2, chapter 4.
[62] See sections 4 2 2, chapter 4.
[63] See section 3 6, chapter 3 for a human rights analysis of water privatisation.
[64] See section 4 2 2, chapter 4.
[65] See section 3 6, chapter 3.
[66] CESCR *General Comment 15* (2002) para 44(a).
[67] See section 4 2 2, chapter 4.
[68] See in this regard section 4 2 2 1, chapter 4 where I discuss and analyse the duty to protect within the context of privatisation.
[69] For further discussion see 4 2 2 2, chapter 4. For further discussion see also section 6 4 5 2, chapter 6.

significant for the protection of the human right to water in the event of involvement of private actors in the provision of water services.

One of the questions this dissertation attempted to answer is whether international human rights law, in particular the human right to water, is directly binding on non-State actors involved in the provision of water services.[70] Chapter 5 questions the efficacy of the State-centric focus of human rights approach discussed in chapter 4 and the challenges it poses for holding non-State actors accountable for human rights in the era of privatisation and liberalisation.[71] It analyses the significance of imposing direct obligations on non-State actors under international human rights law. Chapter 5 discusses and analyses both existing and emerging mechanisms to impose human rights responsibilities on non-State actors and their potential for holding corporations responsible for the right to water in privatised contexts. These include the provisions of various international human rights instruments, domestic legislation, global and other UN-sponsored initiatives as well as voluntary corporate codes of conduct and other multi-stakeholder mechanisms.[72]

Recent experiences have demonstrated that non-State actors such as corporations can (and often do) abuse human rights such as the right to water. This is particularly the case where States are unable or unwilling to reign in such entities. Chapter 5 attempted to clarify the human rights obligations and responsibilities of such non-State actors given their increasing involvement in the provision of human rights sensitive services such as water.

Newly independent States initiated the impetus towards imposing direct human rights obligations on Multinational Corporations (hereinafter referred to as "MNCs" in the 1970s.[73] These States also wanted to reduce incidences of political interference in their domestic affairs by powerful MNCs. A notable incident was the involvement of a US entity, ITT Corporation in the overthrow by military coup of Chilean President Salvador Allende in 1973.[74] One of the earliest attempts at establishing binding obligations on MNCs was the UN Code of Conduct on Transnational Corporations. The UN Code of Conduct on Transnational Corporations

[70] See section 5 1, chapter 5.
[71] See section 5 1 2, chapter 5 where this dissertation interrogates and questions the State-centric focus on human rights treaties.
[72] See sections 5 3 and 5 4, chapter 5.
[73] See section 5 3, chapter 5 on global initiatives to impose human rights responsibilities on non-State actors.
[74] See section 5 3 1, chapter 5.

was the first attempt at the UN level to usher in binding norms to regulate the activities of MNCs.[75] Disagreements on the content and scope of application of the draft code between the industrialised countries and the developing countries resulted in failure to adopt the envisaged instrument.[76]

A range of initiatives have since been developed in an attempt to impose human rights responsibilities on non-States actors. The UN has succumbed to pressure to adopt binding norms on MNCs by embarking on initiatives aimed at identifying, clarifying and elaborating international human rights responsibilities of MNCs as reflected in the UN Framework and Guiding Principles discussed in chapter 5.[77]

This dissertation demonstrated that, in addition to the State's duty to protect against third party infringement with the right, corporations have human rights obligations under the human right to water. This dissertation elaborated that non-State actors have an obligation to respect the right to water.[78] The corporate responsibility to respect the right to water means that the corporation must refrain from acts or omissions whose effect is to interfere or deprive individuals or groups' enjoyment of their right to water.[79] Significantly, this dissertation argued that the private water provider is obliged to carry out a human rights due diligence study to become aware of, prevent and address adverse human rights impacts on the right to water. This process should enable the corporation to identify, prevent, mitigate and account for any impacts on the right to water as a result of its operations. Additionally, a non-State service provider has a responsibility to put into place mechanisms that allow individuals and groups to bring alleged human rights abuses of the right to water to the attention of the service provider.[80] Chapter 5 emphasised that a private water services provider has a duty to provide adequate remedy whenever a breach of the right to water occurs.[81]

This dissertation also analysed emerging voluntary soft law initiatives involving corporations, States, non-governmental organisations and inter-governmental organisations in an attempt to impose human rights responsibilities on corporations in

[75] See section 5 3, chapter 5.
[76] See section 5 3, chapter 5.
[77] See section 5 3, chapter 5 for a discussion of these UN initiatives.
[78] See 5 3 3, chapter 5.
[79] See 5 3 3, chapter 5.
[80] See section 5 3 3 2, chapter 5.
[81] For further discussion, see 5 3 2 4, chapter 5.

the absence of binding international standards. The relevance of corporate-driven and UN-initiated norms within the context of water privatisation for holding water corporations to account for the human right to water was also analysed. Chapter 5 demonstrated that, despite the limitations posed by the voluntary nature of such initiatives, these mechanisms show real promise for strengthening regulation by filling regulatory gaps against non-State actors.[82] Such mechanisms are valuable especially for developing States that are either unwilling or lack essential capacities to regulate MNCs.[83] This dissertation has demonstrated that these emerging mechanisms, if properly harnessed alongside strengthening the domestic legislation of States, can play an important role in holding private water providers accountable for the human right to water.

A significant contribution of this dissertation is its development of an accountability model designed to ensure that States as well as non-State actors involved in the provision of water services have clearly designated roles and responsibilities to give effect to the obligations imposed by the human right to water.[84] Chapter 6 analysed and discussed good practices from different jurisdictions such as legal frameworks, national policy initiatives, strategies, plans of action, regulatory systems and institutions employed by States and other actors consistent with the normative standards imposed by the right to water.[85]

An important aspect of the accountability model developed in chapter 6 is to specify in greater detail the concrete substantive and procedural obligations that the right to water imposes on States and non-State actors in privatisation scenarios.[86] An important prong of the model is the State's duty to protect against human rights abuses of the right to water by third parties, including corporations, through appropriate policies, regulation and adjudication. The State has an obligation to prevent third parties from threatening access to equal, affordable, sufficient, safe and acceptable water.[87] The accountability model further emphasised the responsibility of water services providers, including non-State actors, to respect the right to water.[88] The duty to respect is broad enough to proscribe the adoption of policies that may

[82] See 5 4 4, chapter 5.
[83] For further discussion, see sections 5 3 7 and 5 4, chapter 5.
[84] See section 6 2, chapter 6.
[85] See 6 3 – 6 6, chapter 6.
[86] See section 6 7, chapter 6 for a pictorial illustration of the accountability model.
[87] See CESCR *General Comment 15* (2002) para 24.
[88] See section 6 3 1, chapter 6 for further discussion.

result in denial of access by poor communities to safe water, rather than simply prohibiting interference with existing access to water services.[89]

Another important aspect of any water privatisation process highlighted in the accountability model is the need to consult and enable the participation of individuals and groups affected by the water privatisation process.[90] The right of individuals and groups to be consulted and participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water.[91] The State must consult and ensure participation of communities at different stages of the water privatisation process. Such consultation and participation should be integral to the adoption of framework legislation governing the provision of water services, the decision whether or not to privatise water services, as well as the privatisation process. The accountability model has shown that such consultation and participation starts during the initial design phase and continues right through construction, implementation and compliance monitoring.[92]

The accountability model has also emphasised that the private water provider must develop and implement a community consultation and participation plan.[93] Issues that must be discussed and agreed upon during the consultation process include the sufficiency, quantity, water quality, regularity of supply, the accessibility, as well as the affordability of water services. The corporation's consultation with and participation of communities affected by the water privatisation agreement provides important insights into their perspectives and concerns regarding the corporation's operations and the implications these have for their human right to water and related rights.[94] The water services provider must ensure that the consultation and participation of affected communities is carried out with particular sensitivity to cultural differences and any perceived power imbalances.

The CESCR has elaborated in General Comment 15 that individuals and groups should, in the formulation and implementation of national water strategies and plans, be given full and equal access to information concerning water issues held by

[89] See section 5 3 3, chapter 5.
[90] For further discussion see section 6 3 2, section 6.
[91] CESCR *General Comment 15* (2002) para 48.
[92] See section 6 3 2, chapter 6.
[93] For further discussion see section 6 3 2 2, chapter 6.
[94] See section 6 3 2 2, chapter 6.

public authorities or third parties.[95] The accountability model demonstrated that both the State and the private water provider have an obligation to ensure equal access to full and transparent information concerning water issues held by public authorities or third parties.[96] Such information must be published in different languages and through multiple media (written, spoken) to ensure that everybody is able to access public information as equitably as possible.

The accountability model emphasised the State's duty to prevent, investigate, and punish abuse of the right to water through adoption of appropriate policies, regulations and adjudication mechanisms.[97] Access to remedies is critical because the right to water may not mean much in the absence of effective remedies for its enforcement.[98] An effective complaints mechanism is key to the implementation of the human right to water. It is an effective tool to ensure that a remedial framework is available against abuse of the right to water by water services providers, especially in a privatisation scenario. The accountability model emphasises the need for victims of water rights abuse to access effective remedies, both judicial and non-judicial. Such effective remedies should be available, both at the State level and at the corporate level. This dissertation also advanced the argument that, alongside judicial mechanisms, States should provide effective and appropriate non-judicial complaints mechanisms as part of a comprehensive State-based system for the remedy of breaches to the right to water.[99] In addition, water services providers must provide operational-level grievance mechanisms to remedy any breach of the right to water.[100] The importance of complaints mechanisms located in the corporation is that they potentially provide early-stage recourse and resolution of any disputes. Non-State-based complaints mechanisms may encompass those mechanisms administered by a water services provider with other stakeholders, by an industry association or a multi-stakeholder group. This dissertation emphasised that while

[95] CESCR *General Comment No15* (2002) para 48.
[96] See section 6 3 4, chapter 6 for further discussion.
[97] See 6 6 1, chapter 6.
[98] The CESCR has emphasised that any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels. See CESCR *General Comment 15* (2002) para 55. For further discussion see section 6 6, chapter 6 for further discussion.
[99] See section 5 3 2 4, chapter 5.
[100] See section 6 6 2, chapter 6 for further discussion.

internal remedies will be adequate in many cases, a right of judicial appeal as a last resort is indispensable.[101]

This dissertation leaves scope for further in-depth research on certain aspects. This study is primarily normative and there is considerable scope for future studies on the implementation of the practices discussed in chapter 6 in order to ascertain their efficacy in providing adequate protection for the normative components of the right to water. Furthermore, this dissertation was confined to an analysis of the implications of privatisation of water services for the human right to water. This dissertation did not focus on sanitation, which often is associated with water. There is emerging literature on sanitation signalling a tentative impetus for its recognition as a human right though the issue remains unsettled. There is scope for research in this regard. Furthermore, this dissertation focused on the human rights responsibilities of corporations involved in the provision of water services, but left the question on the potential responsibilities for the right to water of institutions such as the World Bank, the International Monetary Fund and regional development banks that have been the main drivers of water privatisation initiatives. There is scope for research on the human rights responsibilities of such entities, if any, with regard to the right to water.

In conclusion, a significant contribution of this dissertation is its development of an accountability model for holding States and non-State actors accountable for the right to water. If properly implemented, the model has the potential to give greater specification to the normative commitments imposed by the right to water in a privatisation scenario as developed in chapters 2, 3, 4 and 5 of this dissertation. This study would have succeeded in its objective if it can contribute towards making sure that all public and private actors involved in the privatisation of water services have clearly designated roles and responsibilities to give effect to the normative standards imposed by the human right to water.

Delineating these roles and responsibilities in greater detail, as this dissertation has sought to do, is significant for four primary reasons. First, it can provide detailed guidance to State and non-State actors contemplating or involved in

[101] The CESCR has emphasised the importance of judicial remedies in General Comment 9. It elaborated that some obligations imposed by human rights such as non-discrimination are such that the provision of some form of judicial remedy would seem indispensable in order to satisfy normative standards imposed by the ICESCR. Where a right guaranteed in the ICESCR cannot be made fully effective without some role for the judiciary, judicial remedies are necessary. See UN CESCR General Comment 9, The Domestic Application of the Covenant (1998) UN Doc E/C.12/1998/24 para 9. See section 6 6 2, chapter 6 for further discussion.

privatisation initiatives in respect of water services. Such guidance is indispensable for ensuring that all stages of the privatisation process and its implementation are consonant with the normative commitments of water as a human right. Second, concrete standards are critical to enabling beneficiaries of the right to water, relevant NGOs and other stakeholders to hold State and non-State agencies accountable. Effective accountability is in turn indispensable to ensuring that the right to water has clear, practical implications in the range of contexts in which water delivery is being privatised. Third, such specification of roles and responsibilities may provide normative guidance to national courts, administrative tribunals and treaty-supervisory bodies in developing their jurisprudence relating to the obligations of States and non-State actors in a privatisation scenario. Fourth, it can further contribute to the development of appropriate legislation regulating water privatisation that gives proper effect to the right to water. Such jurisprudence and legislation can in turn enhance the further development of the accountability model by providing greater specification of the norms and standards imposed by the right to water. It is only through giving greater specification to the normative commitments of water as a human right in particular contexts such as privatisation scenarios that the right will assume real relevance for those it was designed to protect and benefit.

Bibliography

Books

Akech M *Privatisation and Democracy in East Africa* (Nairobi: East African Educational Publishers, 2009).

Bakker KJ *An Uncooperative Commodity: Privatising Water in England and Wales* (Oxford: Oxford University Press, 2005).

Bakker K *Privatising Water: Governance Failure and the World's Urban Water Crisis* (London & Ithaca: Cornell University Press, 2010).

Barlow M & Clarke T *Blue Gold: The Battle against Corporate Theft of the World's Water* (London: Earthscarn Ltd, 2002).

Blichitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Social Economic Rights* (Oxford: Oxford University Press, 2007).

Brownlie I *Principles of Public International Law* (Oxford: Oxford University Press, 2003).

Chang CV *Privatisation and Development: Theory, Policy and Evidence* (Aldershot: Ashgate Publishing Ltd, 2006).

Chapman A & Russel S (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia nv, 2002).

Chenwi L & Tissington K *Engaging Meaningfully with Government on Socio-Economic Rights – A Focus on the Right to Housing* (Cape Town: University of Western Cape, Community Law Centre, 2010).

Chirwa DM *Human Rights under the Malawian Constitution* (Cape Town: Juta & Co. Ltd, 2011).

Clapham A *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).

Clapham A *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993).

Conca K *Governing Water: Contentious Transnational Politics and Global Institution Building* (Cambridge: MIT Press, 2006).

Cranston M *What are Human Rights?* (New York: Taplinger Publishing Co, 1973).

De Schutter O *International Human Rights: Cases, Materials, Commentary* (Cambridge: Cambridge University Press, 2010).

Drucker PF *The Age of Discontinuity* (New York: Harper and Row, 1968).

Dwivedi G *Public-Private Partnerships in Water Sector: Partnerships or Privatisation?* (Badwani: Manthan Adhyayan Kendra, 2010).

Eide A (ed) *The Universal Declaration of Human Rights: A Commentary* (New York: Oxford University Press, 1992).

Friedman M *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962).

Frynas JC & Pegg S (eds) *Transnational Corporations and Human Rights* (London: Macmillian, 2003).

Gibbons DC *The Economic Value of Water* (Washington D.C.: Resources for the Future, 1986).

Gibney M & Skogly S (ed) *Universal Human Rights and Extraterritorial Obligations* (Pennsylvania: University of Pennsylvania, 2010).

Gleick PH *The World's Water 2000-2001: The Biennial Report on Fresh Water Resources* (Washington: Island Press, 2001).

Gomien D, Harris D & Zwaak L *Law Practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg: Council of Europe Publishing, 1996).

Hall D *Water Multinationals – No Longer Business as Usual* (London: Public Services International Research Unit, 2003).

Harvey D *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005).

Hayek FA *The Road to Serfdom* (Chicago: University of Chicago Press, 1944).

Higgins R *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1995).

Hoexter C *Administrative Law in South Africa* (Wetton: Juta Legal & Co, 2007).

Howard G & Bartram J *Domestic Water Quantity, Service Level and Health* (Geneva: WHO, 2003).

International Consortium of Investigative Journalists *The Water Barons: How a Few Powerful Companies Are Privatising Your Water* (Washington DC: Public Integrity Books, 2003).

Janis MW *An Introduction to International Law* (New York: Aspen Publishers, 2003).

Joseph S & McBeth A *Research Handbook in International Human Rights* (Cheltenham: Edward Elgar Publishing limited, 2010).

Koch IE *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Boston: Martinus Nijhoff Publishers, 2009).

Kramer M, Simmonds NE & Steiner H *A Debate over Rights: Philosophical Enquiries* (Oxford: Clarendon Press, 1998).

Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008).

Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative* Constitution (Claremont: Juta & Co Ltd, 2010).

Langford M, Khalfan A, Fairstein C & Jones H *Legal Resources for the Right to Water: International and National Standards* (Geneva: Centre on Housing Rights and Evictions, 2004).

Malanczuk P *Akehurst's Modern Introduction to International Law* (London: Routledge, 7th ed 2005).

Marin P *Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries* (Washington D C: World Bank Publications, 2009).

McDonald B & Jehl D (eds) *Whose Water Is It?: The Unquenchable Thirst of a Water-Hungry World* (Washington DC: National Geographic, 2003).

McDonald DA & Ruiters G (eds) *The Age of Commodity: Water Privatisation in Southern Africa* (London and Sterling VA: Earthscan, 2005).

Megginson WL *The Financial Economics of Privatisation* (Oxford: Oxford University Press, 2005).

Meron T *Human Rights Law-Making in the United Nations* (Oxford: Oxford University Press 1986).

Milton F *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962).

Mowbray A *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004).

Movik S *Fluid Rights: Water Allocation Reform in South Africa* (Cape Town: HSRC Press, 2012)

Muchlinski PT *Multinational Enterprises and the Law* (Oxford: Blackwell, 1999).

Obadan MI *The Economic and Social Impact of Privatisation of State-Owned Enterprises* (Dakar: CODESRIA, 2008).

Oxford Pro Bono Publico *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse. A Comparative Submission Prepared for Professor John Ruggie UN Secretary-General's Special Representative on Business and Human Rights* (Oxford: University of Oxford, 2008).

Quinot G *State Commercial Activity: A Legal Framework* (Claremont: Juta Law, 2010).

Rasche A & Kell G (eds) *The United Nations Global Compact: Achievements, Trends and Challenges* (Cambridge: Cambridge University Press, 2010).

Ratner SR & Abrams JS *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Oxford University Press, 2nd ed 2001).

Raz J *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

Rothfeder J *Every Drop for Sale: Our Desperate Battle Over Water in a World about to Run Out* (New York: Tarcher/Putnam, 2001).

Salman SMA & McInerny-Lankford S *The Human Right to Water: Legal and Policy Dimensions* (Washington D C: World Bank, 2004).

Savas ES *Privatisation: The Key to Better Government* (Chatham: Chatham House Publishers, 1987).

Sepulveda MM *The Nature of Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp/ Oxford/ New York: Intersentia, 2003).

Sethi SP *Setting Global Standards, Guidelines for Creating Codes of Conduct in Multinational Corporations* (New York: John Wiley and Sons Inc, 2003).

Shiva V *Privatisation, Pollution and Profit* (Cambridge, MA: South End Press, 2002).

Shue H *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton: Princeton University Press, 1980).

Skogly SI *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London: Cavendish Publishing, 2001).

Snitow A & Kaufam D et al *Thirst: Fighting the Corporate Theft of Our Water* (San Francisco: John Wiley & Sons, 2007).

Strange S *The Retreat of the State* (Cambridge: Cambridge University Press, 1996).

Taylor L *Structuralist Macroeconomics, Applicable Models for the Third World* (New York: Basic Books, 1983).

Vickers J & Yarrow M *Privatisation: An Economic Analysis* (Cambridge, MA: The MIT Press, 1988).

Waldron J *Liberal Rights: Collective Papers 1981-1991* (Cambridge: Cambridge University Press, 1993).

Weizsäcker Von EU, Young OR, Finger M & Beisheim M *Limits to Privatisation: How to Avoid too much of a Good Thing, A Report to the Club of Rom*e (London: Earthscarn, 2005).

Winkler IT *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Oxford: Hart Publishing Ltd, 2012).

Chapters in Books

Allan JA “Water Resource Development and Environment in the 20th Century: First the Taking, then the Putting Back” in Rodda JC & Ubertini L (eds) *The Basis of Civilisation – Water Science* (Wallingford: International Association of Hydrological Sciences Press, 2004) 135 – 149.

Alston P “Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?” in Alston P (ed) *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 3 - 36.

Alvarez IJ “The Right to Water as a Human Right” in Piccolloti R & Taillent JD (eds) *Linking Human Rights and the Environment* (Arizona: Arizona Press, 2003) 2 – 37.

Barlow M “The Human Right to Water, an Idea Whose Time has Come” in Mancisidor M (ed) *The Human Right to Water – Current Situation and Future Challenges* (Barcelona: Icaria, 2008) 167 – 177.

Bertucci G & Alberti A "Globalisation and the Role of the State: Challenges and Perspectives" in Rondinelli DA & Shabbir C (eds) *Reinventing Government for the Twenty-First Century, State Capacity in a Globalising Society* (Stanford, CT: Kumarian Press Inc, 2003) 17 - 31.

Brand D "Introduction to Socio-Economic Rights in the South African Constitution" in Brand D & Heyns CH (eds) *Socio-Economic Rights in South Africa* (Pretoria: Pretoria University Law Press, 2005) 1 – 56.

Budlender G "Justiciability of Socio-Economic Rights: Some South African Experiences" in Yash G & Jill C (eds) *Economic, Social & Cultural Rights in Practice, The Role of Judges in Implementing Economic, Social & Cultural Rights* (London: Interrights, 2004) 33 - 41.

Clapham A "Non State Actors" in Chetail (eds) *Post-Conflict Peacebuilding: A Lexicon* (Oxford: Oxford University Press, 2009) 200 – 212.

Clements L & Simmons A "European Court of Human Rights: Sympathetic Unease" in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (New York: Cambridge University Press, 2008) 409 - 427.

Chirwa DM "African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights" in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 323 - 338.

Craven M "Assessment of the Progress of Adjudication of Economic, Social and Cultural Rights" in Squires J, Langford M & Thiele (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Geneva: Centre on Housing Rights and Evictions, 2005) 27 – 42.

Cusack S & Cook RJ "Combating Discrimination based on Sex and Gender" in Krause C & Scheinin M (eds) *International Protection of Human Rights* (Turku/Åbo: Åbo Akademi University, Institute for Human Rights, 2009) 205 - 226.

Dargantes B, Batistel C & Manahan MA "Springs of Hope: Alternatives to Commercialisation of Water Services in Asia" in McDonald DA & Ruiters G *Alternatives to Privatisation: Public Options for Essential Services in the Global South* (Cape Town: HSRC Press, 2012) 222 - 281.

De Schutter O "The European Social Charter" in Crause C & Scheinini M *International Protection of Human Rights: A Textbook* (Turku/Åbo: Åbo Akademi University, Institute of Human Rights, 2009) 425 - 442.

Dicke K "The Founding Function of Human Dignity in the Universal Declaration of Human Rights" in Kretzmer D & Klein E (ed) *The Concept of Human Dignity in Human Rights Discourse* (New York: Kluwer Law International, 2000) 111 – 120.

Dickinson LA ''Contract as a Tool for Regulating Private Military Companies'' in Chesterman S & Lehnardt C (eds) *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007) 217 – 238.

Dinstein Y "The Right to Life, Physical Integrity and Liberty" in Henkin L (ed) *The International Bill of Rights – The Covenant on Civil and Political Rights* (New York: Colombia University Press, 1981) 115 – 137.

Donnison D "The Progressive Potential of Privatisation" in Le Grand J & Robinson R (eds) *Privatisation and the Welfare State* (London: Allen and Unwin, 1984) 45 - 57.

Eide A "Universalisation of Human Rights versus Globalisation of Economic Power" in Coomans F, Grunfeld F, Westerndorp I & Willems J (eds) *Rendering Justice to the Vulnerable: Liber Amicorum in Honour of Theo Van Boven* (The Hague: Kluwer International, 2000) 99 - 120.

Eide A "Economic, Social and Cultural Rights as Human Rights" in Eide A, Krause C & Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (Dordrecht/ Boston/ London: Martinus Nijhoff, 2001) 9 - 28.

Eide A "State Obligations for Human Rights: The Case of the Right to Food" in Hospes O & Hadiprayitno I *Governing Food Security: Law, Politics and the Right to Food* (Wageningen: Wageningen Academic Publishers, 2010) 105 - 122.

Fairstein C "Legal Strategies and Right to Water in Argentina" in Riedel E & Rothen P (eds) *The Human Right to Water* (Berlin: Berliner Wissenschafts-Verlag, 2006) 95 - 113.

Gayle DJ & Goodrich JN "Exploring the Implications of Privatisation and Deregulation" in Gayle DJ & Goodrich JN (eds) *Privatisation and Deregulation in Global Perspective* (New York: Quorum Books, 1990) 8 - 20.

Gewirth A "Human Dignity as the Basis of Rights" in Meyer MJ & Parent WA *The Constitution of Rights: Human Dignity and American Values* (Ithaca and London: Cornell University Press, 1992) 5 - 17.

Gianviti F "Economic, Social and Cultural Rights and the International Monetary Fund" in Alston P (ed) *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005)113 – 138.

Gross AM "The Right to Health in an Era of Privatisation and Globalisation: National and International Perspectives" in Barak-Erez D & Gross AM (eds) *Exploring Social Rights: Between Theory and Practice* (Oxford and Portland: Hart Publishing Ltd, 2007) 289 - 303.

Gutierrez HC & Alpuente FD "The Human Rights Challenges for the International Decade for Action 'Water for Life' 2005 - 2015" in Mancisidor M (ed) *The Human Right to Water – Current Situation and Future Challenges* (Barcelona: Icaria, 2008) 181 – 194.

Heald D "Privatisation and Public Money" in Steel D & Heald D (eds) *Privatising Public Enterprises: Options and Dilemmas* (London: Royal Institute of Public Administration, 1984) 21 - 44.

Hoof Van GJH "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views" in Alston P & Tomasevski K (eds) *The Right to Food* (Dordrecht: (Utrecht: Martinus Nijhoff, 1984) 97 – 110.

Isa FG "Globalisation, Privatisation and Human Rights" in Feyter de K & Isa FG *Privatisation and Human Rights in the Age of* Globalisation (Antwerp/Oxford: Intersentia, 2005*)* 9 - 31.

Isa FG "Water and Privatisation: A Human Rights Approach" in Mancisidor M (ed) *The Human Right to Water – Current Situation and Future Challenges* (Barcelona: Icaria, 2008) 153 – 163.

Joseph S "Liability of Multinational Corporations" in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 613 - 627.

Josselin D & Wallace D "Non State Actors in World Politics: A Framework" in Josellin D & Wallace D (eds) *Non State Actors in World Politics* (New York: Palgrave, 2001) 1 - 20.

Khaliq U & Churchill R "The European Committee of Social Rights: Putting Flesh on the Bare Bones of the European Social Charter" in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (New York: Cambridge University Press 2008) 428 - 452.

Kiefer T & Roaf V "The Human Right to Water and Sanitation-Benefits and Limitations" in Mancisidor M (ed) *The Human Right to Water – Current Situation and Future Challenges* (Barcelona: Icaria, 2008) 127 - 150.

Kok A "Privatisation and the Right to Access Water" in De Feyter K & Isa FG (eds) *Privatisation and Human Rights in the Age of Globalisation* (Antwerp and Oxford: Intersentia, 2005) 259 – 286.

Laban P "Accountability and Rights in Right-Based Approaches for Local Water Governance" in Biswas AK, Rached E & Tortajada C (ed) *Water as a Human*

Right for the Middle East and North Africa (London and New York: Routledge) 147 – 159.

Langford M "Human Rights and World Water Crises: From Law to Practice" in Mancisidor M (ed) *The Human Right to Water – Current Situation and Future Challenges* (Barcelona: Icaria, 2008) 53 - 75.

Liebenberg S "Socio-Economic Rights" in Chaskalson M et al (eds) *Constitutional Law of South Africa* (Cape Town: Juta, 1996, RS 5 1999) 1 - 56.

Liebenberg S "Violations of Socio-Economic Rights: The Role of the South African Human Rights Commission" in Andrews P & Ellmann S (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (Johannesburg and Athens: Witwatersrand University Press and Ohio University Press, 2001) 405 - 443.

Liebenberg S "The Protection of Economic and Social Rights in Domestic Legal Systems" in Eide A, Krause C & Rosas A (eds) *Economic, Social and Cultural Rights - A Textbook* (Dordrecht: Martinus Nijhoff Publishers, 2001) 55 - 84.

Liebenberg S "Making a Difference: Human Rights and Development - Reflecting on the South African Experience" in Andreassen BA & Marks S (eds) *Development As a Human Right: Legal, Political and Economic Dimensions* (Cambridge: Harvard University Press, 2006) 167 – 195.

Liebenberg S "Socio-Economic Rights under South Africa's Transformative Constitution" in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 75 – 101.

Lobina E "Problems with Private Water Concessions: A Review of Experience and Analysis of Dynamics" in Biswas AK & Tortajada C (ed) *Water Pricing and Public-Private Partnership* (London and New York: Routledge, 2005) 53 – 85.

McKinley D "The Struggle against Water Privatisation in South Africa" in Balanyá B et al (eds) *Reclaiming Public Water: Achievements, Struggles and Visions from Around the World* (Amsterdam: Transnational Institute & Corporate Europe Observatory, 2005) 181 - 189.

Melish TJ "The Inter-American Court of Human Rights: Beyond Progressivity" in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 372 - 408.

Muchlinski PT "Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD" in Kamminga MT & Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 97 – 117.

Muralidhar S "The Right to Water: An Overview of the Indian Legal Regime" in Riedel E & Rothen P (eds) *The Human Right to Water* (Berlin: Berliner Wissenschafts-Verlag, 2006) 65 - 81.

Porter B "The Crisis of ESC Rights and Strategies for Addressing It" in Squires J, Langford M & Thiele B (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Geneva: Centre on Housing Rights and Evictions 2005) 43 - 69.

Prouvez N "Confronting Racial Discrimination and Inequality in the Enjoyment of Economic, Social and Cultural Rights" in Langford M (ed) S*ocial Rights Jurisprudence: Emerging Trends in International Law and Comparative Law* (New York: Cambridge University Press, 2008) 517 - 539.

Reed D "Case Study for Tanzania" in Reed D (ed) *Structural Adjustment, the Environment and Sustainable Development* (London: Earthscan, 1996) 107 - 127.

Reidel E "Economic, Social and Cultural Rights" in Crause C & Scheinini M *International Protection of Human Rights: A Textbook* (Turku/Åbo: Åbo Akademi University Institute of Human Rights, 2009) 129 - 149.

Romany C "State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in Human Rights Law" in Cook R (ed) *Human Rights of Women: National and International Perspectives* (Pennsylvania: University of Pennsylvania Press, 1994) 85 - 95.

Ruiters G "The Political Economy of Public-Private Contracts: Urban Water in two Eastern Cape Towns" in McDonald DA (ed) *The Age of Commodity: Water Privatization in Southern Africa* (London and Sterling VA: Earthscan, 2005) 145 - 148.

Sandoval-Minero R "Participation of the Private Sector in Water and Sanitation Services: Assessment of Guanajuato, Mexico" in Biswas AK & Tortajada C (ed) *Water Pricing and Public-Private Partnership* (London and New York: Routledge, 2005) 179 – 195.

Scheinin M "Characteristics of Human Rights Norms" in Krause C & Scheinin M (eds) *International Protection of Human Rights: A Texbook* (Turku/Åbo: Åbo Akademi University, Institute of Human Rights, 2009) 19 - 27.

Senyongo M "Non State Actors and Economic, Social and Cultural Rights" in Baderin MA & McCorquodale R *Economic, Social and Cultural Rights in Action* (Oxford: Oxford University Press, 2006) 109 - 135.

Shue H "The Interdependence of Duties" in Alston P & Tomasevski K (eds) *The Right to Food* (Dordrecht: Martinus Nijhoff Publishers, 1985) 83 - 95.

Teubner G "Global Bukowina: Legal Pluralism in the World" in Teubner G (ed) *Global Law Without a State* (Aldershot: Dartmouth, 1997) 3 – 28.

Thomas C "International Financial Institutions and Social and Economic Rights: An Exploration" in Evans T (ed) *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press, 1998) 161 - 185.

Trindade AAC "The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change" in Weiss EB (ed) *Environmental Change and International Law: New*

Challenges and Dimensions (Tokyo: United Nations University Press, 1992) 244 – 312.

Van Bowen T "A Universal Declaration of Human Responsibilities" in Van der Heijden B & Tahzid-Lie B (eds) *Reflections on the Universal Declaration of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1998) 73 - 79.

Weissbrodt D & Kruger M "Human Rights Responsibilities of Business as Non-State Actors" in Alston P (ed) *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 315 – 350.

Wells C & Elias J "Catching the Conscience of the King: Corporate Players on the International State" in Alston P *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 141 – 175.

Journal articles

Abu-Zeid MA "Water and Sustainable Development: The Vision for World Water, Life and the Environment" (1998) 1 *Water Policy* 9 – 19.

Abbot KW & Snidal D "Hard and Soft International Legal Governance" (2000) 54 *International Organisations* 421 - 456.

Abbott KW & Snidal D "Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit" (2009) 42 *Vanderbilt Journal of Transnational Law* 501 - 538.

Abramowitz M "The Privatisation of the Welfare State: A Review" (1986) 4 *Social Work* 257 - 264.

Ahlers R "Fixing and Nixing: The Politics of Water Privatisation" (2010) 42 *Review of Radical Political Economics* 200 - 230.

Albuquerque de C & Winkler IT "Neither Friend nor Foe: Why the Commercialisation of Water and Sanitation Services is not the Main Issue in the Realisation of Human Rights" (2010) 17 *Brown Journal of World Affairs*167 - 179.

Aldston F "Biwater v Tanzania: Do Corporations Have Human Rights and Sustainable Development Obligations?" (2010) 18 *Environmental Liability* 58 - 66.

Alston P "Conjuring up New Rights: A Proposal for Quality Control" (1984) 78 *The American Journal of International Law* 607 - 621.

Alston P "Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 332 – 381.

Alston P & Quinn G "The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 156 - 229.

Backer LC "On the Evolution of the United Nations' 'Protect-Respect- Remedy' Project: The State, the Corporation and Human Rights in a Global Governance Context" (2010) 9 *Santa Clara Journal of International Law* 101 - 156.

Baccaro L & Mele V "For Lack of Anything Better? International Organisations and Global Corporate Codes" (2011) 89 *Public Administration* 451 – 470.

Bakker K "From State to Market? Water Mercantilizacion in Spain" (2002) 34 *Environment and Planning* 767 - 790.

Bakker K "The 'Commons' versus 'Commodity': Alter-Globalization, Anti-Privatization and the Human Rights to Water in the Global South" (2007) 39 *Antipode* 430 - 455.

Bakker S, Van Den Berg M, Duzenli D & Radstaake M "Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)" (2009) 1 *Journal of Human Rights Practice* 436 - 458.

Bartley T "Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions" (2007) 113 *American Journal of Sociology* 297 - 351.

Backer LC "On the Evolution of the United Nations 'Protect-Respect- Remedy' Project: The State, the Corporation and Human Rights in a Global Governance Context" (2010) 9 *Santa Clara Journal of International Law* 101 - 156.

Bayliss K "Utility Privatisation in Sub-Saharan Africa: A Case Study of Water" (2003) 41 *Journal of Modern African Studies* 507- 522.

Bernhagen P & Mitchell NJ "The Private Provision of Public Goods: Corporate Commitments and the United Nations Global Compact" (2010) 54 *International Studies Quarterly* 1175 –1187.

Bilchitz D "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance" (2002) 118 *South African Law Journal* 484 - 501.

Bilchitz D "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio- Economic Rights Jurisprudence" (2003) 19 *South African Journal on Human Rights* 1 - 26.

Bilchitz D "Placing Basic Needs at the Centre of Socio-Economic Rights Jurisprudence" (2003) 4 *Economic and Social Rights Review* 2 - 4.

Bilchitz D "Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations" (2008) 124 *South African Law Journal* 754 - 789.

Bilchitz D "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?" 2010 (7) *International Journal on Human Rights* 199 - 229.

Blumel EB "Implications of Formulating Human Right to Water" (2004) 31 *Ecology Law Quarterly* 957 - 1006.

Bond P, McDonald D & Ruiters G "Water Privatisation in SADC: The State of the Debate" (2003) 4 *Economic and Social Rights Review* 4 – 13.

Bond P "Water Commodification and Decommodification Narratives: Pricing, Policy Debates from Johannesburg to Kyoto to Cancun and Back" (2004) 15 *Capitalism Nature Socialism* 7 – 19.

Bortolotti B, Fantini M & Siniscalco D "Privatisation: Politics, Institutions, and Financial Markets" (2001) 2 *Emerging Markets Review* 109 – 136.

Boycko M, Schleifer A & Vishny RW "A Theory of Privatisation" (1993) 106 *The Economic Journal* 309 - 319.

Brune N, Garrett G & Kogut B "The IMF and the Global Spread of Privatisation" (2004) 31 *IMF Staff Papers* 195 - 219.

Budds J & McGranahan G "Are the Debates on Water Privatization Missing the Point? Experiences from Africa, Asia and Latin America" (2003) 15 *Environment & Urbanization* 87 - 113.

Byrnes A & Connors J "Enforcing the Human Rights of Women: A Complaints Procedure for the Convention on the Elimination of All Forms of Discrimination Against Women?" (1992) 21 *Brooklyn Journal of International Law* 679 - 734.

Byrnes A, Graterol MH & Chartes R "State Obligation and the Convention on the Elimination of All Forms of Discrimination against Women" (2007) 48 *University of New South Wales Faculty of Law Research Series* 1 - 29.

Burca & Scott J "Narrowing the Gap? Law and New Approaches to Governance in the European Union: Introduction" 2007 (13) *Columbia Journal of European Law* 513 – 764.

Cahill A "The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water" (2005) 9 *International Journal of Human Rights* 389 – 410.

Carozza PG “Subsidiarity as a Structural Principle of Human Rights Law” (2003) 97 *American Journal of International Law* 38 – 49.

Černič JL “Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises” (2008) 4 *Hanse Law Review* 71 – 96.

Chirwa DM “Obligations of Non-State Actors in Relation to Economic and Social Rights under the South African Constitution” (2003) 7 *Mediterranean Journal of Human Rights* 29 – 68.

Chirwa DM “The Doctrine of State Responsibility as a Potential means of holding Private Actors Accountable for Human Rights” (2004) 5 *Melbourne Journal of International Law* 1 – 36.

Chirwa DM “Privatisation of Water in Southern Africa: A Human Rights Perspective” (2004) 4 *African Human Rights Law Journal* 218 - 241.

Chirwa DM “Water Privatisation and Socio-Economic Rights in South Africa” (2004) 8 *Law, Democracy & Development* 181 - 206.

Chirwa DM “The Long March to Binding of Obligations of Transnational Corporations in International Human Rights Law” (2006) 22 *South African Journal of Human Rights* 76 - 98.

Chirwa DM “In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights” (2008) 8 *African Human Rights Law Journal* 294 - 311.

Cottier M “Elements for Contracting and Regulating Private Security and Military Companies” (2008) 88 *International Review of the Red Cross* 637 - 663.

Craven M “The Domestic Application of the International Covenant on Economic, Social and Cultural Rights” (1993) 40 *Netherlands International Law Review* 367 – 404.

David MN "Privatisation and Liberalisation of Network Utilities" (1997) 41 *European Economic Review* 357 - 383.

Dennis M & Stewart D "Justiciability of Economic, Social and Cultural Rights: Should there be an International claims Mechanism to Adjudicate the Rights to Food, Water and Health?" (2004) 98 *American Journal of International Law* 462 - 515.

Deva S "Human Rights Violations by Multinational Corporations and International Law: Where from Here?" (2003) 19 *Connecticut Journal of International Law* 1 – 57.

Deva S "UN Human Rights Norms for Transnational Corporations: An Imperfect Step in the Right Direction" (2004) 10 *ILSA Journal of International & Comparative Law* 493 – 523.

Deva S "Global Compact: A Critique of the UN's 'Public-Private' Partnership for Promoting Corporate Citizenship" (2006) 34 *Syracuse Journal of International Law & Commerce* 107 - 151.

Deva S "Guiding Principles on Business and Human Rights: Implications for Companies" (2012) 9 *European Company* 101 – 109.

De Vos P "Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution" (1997) 13 *South African Journal of Human Rights* 67 - 101.

Desai B "Enforcement of the Right to Environment Protection through Public Interest Litigation in India" (1993) 33 *Indian Journal of International Law* 27- 40.

Dias CJ "Corporate Human Rights Accountability and the Human Right to Development: The Relevance and Role of Corporate Social Responsibility" (2011) 4 *JUJS Law Review* 495 - 521.

Doering E "The Reform of the Water Sector in Tanzania" (2005) 3 *Summer School: Topics of Integrated Watershed Management Proceedings* 35 - 53.

Dugard J "Can Human Rights Transcend the Commercialisation of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy" (2010) 42 *Review of Radical Political Economics* 175 - 194.

Du Plessis A "A Government Deep in Water? Some Thoughts on the State's Duties in Relation to Water Arising from South Africa's Bill of Rights" (2010) 19 *Review of European Community & International Environmental Law* 316 – 327.

Eisinger PK "French Urban Housing and the Mixed Economy: The Privatisation of the Public Sector" (1982) 459 *Annals of the American Academy of Political and Social Sciences* 134 - 147.

Epp C "Implementing the Rights Revolution: Repeat Players and the Interpretation of Diffuse Legal Messages" (2008) 71 *Law and Contemporary Problems* 41- 52.

Feigenbaum HB & Henig JR "The Political Underpinnings of Privatisation: A Typology" (1994) 46 *World Politics* 185 - 208.

Francis R "Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power" (2005) 18 *Georgetown International Environmental Law Review* 149 - 196.

Freeman M "The Philosophical Foundations of Human Rights" (1994) 16 *Human Rights Quarterly* 491 - 514.

Gamble A "Privatisation, Thatcherism, and the British State" (1988) 16 *Journal of Law and Society* 1 - 20.

Gleick PH "Basic Water Requirements for Human Activities: Meeting Basic Needs" (1996) 21 *Water International* 83 - 92.

Gleick PH "The Human Right to Water" (1999) 1 *Water Policy* 487 – 503.

Graham D & Woods N "Making Corporate Self-Regulation Effective in Developing Countries" (2006) 34 *World Development* 868 - 883.

Goldsmith JL & Posner EA "A Theory of International Law" (1999) 66 *The University of Chicago Law Review* 1113 - 1116.

Günther K "Legal Pluralism or Uniform Concept of Law? Globalisation as a Problem of Legal Theory" (2008) 5 *NoFo* 5 - 21.

Hale SI "Water Privatisation in The Philippines: The Need to Implement the Human Right to Water" (2006) 15 *Pacific Rim Law and Policy Journal* 765 – 773.

Hall D, Lobina E & De Le Motte R "Public Resistance to Privatisation in Water and Energy" (2005) 15 *Development in Practice* 286 - 301.

Hall D & Lobina E "Profitability and the Poor: Corporate Strategies, Innovation and Sustainability" (2007) 38 *Geoforum* 772 – 785.

Hanke SA "Privatisation: Theory, Evidence and Implementation" (1985) 35 *Proceedings of the Academy of Political Science* 101 - 113.

Hardberger A "Life, Liberty and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it creates" (2005) 4 *Northwest International Journal on Human Rights* 331 – 362.

Harvard Law Review "What Price for the Priceless?: Implementing the Justiciability of the Right to Water" (2007) 20 *Harvard Law Review* 1067 – 1088.

Hessbruegge JA "Human Rights Violations Arising from Conduct of Non-State Actors" (2005) 11 *Buffalo Human Rights Law Review* 21 - 88.

Hepple B "Negotiating Social Change in the Shadow of the Law" (2012) 129 *South African Law Journal* 248 - 273.

Jochnick C "Confronting the Impunity of Non-State Actors: New fields for the Promotion of Human Rights" (1999) 21 *Human Rights Quarterly* 56 – 79.

K'Akumu OA "Privatisation Model for Water Enterprise in Kenya" (2006) 8 *Water Policy* 539 - 542.

Kapindu RE "The Desperate Left in Desperation: A Court in Retreat - Nokotyana v Ekurhuleni Metropolitan Municipality Revisited" (2010) 3 *Constitutional Court Review* 201 - 222.

Keifer T & Brolmann C "Beyond State Sovereignty: The Human Right to Water" (2005) 5 *Non-State Actors and International Law* 183 – 208.

Kende MS "The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to the Critics" (2003-2004) 19 *Connecticut Journal of International Law* 617 - 629.

Kidd M "Not a Drop to Drink: Disconnection of Water Services for Non-Payment and the Right to Access Water" (2004) 20 *South African Journal on Human Rights* 119 - 137.

Klare KE "Legal Culture and Transformative Constitutionalism" (1998) 14 *South African Journal of Human Rights* 146 - 188.

Koch IE "The Justiciability of Indivisible Rights" (2003) 72 *Nordic Journal of International Law* 3 – 39.

Kornfeld I "A Global Water Apartheid: From Revelation to Resolution" (2010) 43 *Vanderbilt Journal of Transnational Law* 701 - 711.

Krisch N & Kingsbury B "Introduction: Global Governance and Global Administrative Law in the International Legal Order" (2006) 17 *The European Journal of International Law* 1 - 13.

Langford M "Ambition that Overleaps Itself? A Response to Stephen Tully's critique of the General Comment on the Right to Water" (2006) 24 *Netherlands Quarterly of Human Rights* 433 – 460.

Leckie S "Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 81 - 91.

Lehmann K “In Defence of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core” (2006) 22 *American University International Law Review* 163 - 197.

Letzai SR, Smallman C & SUN X “Reframing Privatisation: Deconstructing the Myth of Efficiency” (2004) 37 *Policy Sciences* 159 – 183.

Liebenberg S “South Africa’s Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?” (2002) 6 *Law, Democracy and Development* 159 - 191.

Liebenberg S “Needs, Rights and Transformation, Adjudicating Social Rights in South Africa” (2005) 6/4 *Economic and Social Rights Review* 3 - 7.

Liebenberg S “The Value of Human Dignity in Interpreting Socio-Economic Rights” 2005 (21) *South African Journal on Human Rights* 1 – 31.

Liebenberg S “The Application of Socio-Economic Rights to Private Law” (2008) 3 *Journal of South African Law* 464 – 480.

Liebenberg S “Grootboom and the Seduction of the Negative/Positive Duties Dichotomy” (2011) 26 *SA Public Law* 37 - 59.

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) 9 *Human Rights Quarterly* 122 – 126.

Lundqvist L “Privatisation: Towards a Concept for Comparative Policy Analysis” (1988) 8 *Journal of Public Policy* 1 – 19.

Mangaliso MP “Corporate Social Responsibility and the Sullivan Principles” (1997) 28 *Journal of Black Studies* 219 - 238.

Mcbeth A “Privatising Human Rights: What Happens to the States’ Human Rights Duties when Services are Privatised?” (2004) 5 *Melbourne Journal of International Law* 133 - 154.

McCaffrey SC “A Human Right to Water: Domestic and International Implications” (1992) 5 *Georgetown International Environmental Law Review* 1 – 24.

McCorquodale R “Overlegalising Silences: Human Rights and Non-State Actors” (2002) 96 *American Society of International Law Proceedings* 384 - 388.

McCorquodale R & Simons P “Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law” (2007) 70 *Modern Law Review* 598 - 625.

McFarland Sanchez-Moreno M & Higgins T “No Recourse: Transnational Corporations and the Protection of ECOSOC Rights in Bolivia” (2004) 27 *Fordham International Law Journal* 1663 – 1805.

McGraw GS “Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence” (2011) 8 *Loyola University Chicago International Law Review* 101 - 131.

Meidinger E “Competitive Supragovernmental Regulation: How Could It Be Democratic?” (2008) 8 *Chicago International Law Journal* 513 - 516.

Meseguer C “What Role for learning The Diffusion of Privatisation in OECD and Latin American Countries” (2004) 24 *Journal of Public Policy* 229 - 325.

Metzger E “Privatisation as Delegation” (2003) 103 *Columbia Law Review* 1367 - 1502.

Meyer T “Soft Law as Delegation” (2009) 32 *Fordham Journal of International Law Journal* 888 - 942.

Miller AK “Blue Rush: Is an International Privatisation Agreement a Viable Solution for Developing Countries in the Face of an Impending World Water Crisis?” (2005) 16 *Indiana International & Comparative Law Review* 217 – 259.

Moyo K “Privatisation of the Commons: Water as a Right; Water as a Commodity” (2011) 22 *Stellenbosch Law Review* 804 - 822.

Murphy SD "Taking Multinational Corporate Codes of Conduct to the Next Level" (2005) 43 *Columbia Journal of Transitional Law* 389 – 434.

Mutua M "The Banjul Charter and the African Fingerprint: An Evaluation of the Language of Duties" (1995) 35 *Virginia Journal of International Law* 339 - 380.

Narain V "Water as a Fundamental Right: A Perspective from India" (2009) 34 *Vermont Law Review* 917 - 925.

Narsiah S "Discourses of Privatisation: The Case of South Africa's Water Sector" (2008) 25 *Development Southern Africa* 21 - 35.

Narsiah S "The Neoliberalisation of the Local State in Durban, South Africa" (2010) 42 *Antipode* 374 - 403.

Narsiah S "Urban Pulse- The Struggle for Water, Life and Dignity in South Africa: The Case of Johannesburg" (2011) 32 *Urban Geography* 149 –155.

Nayar MGK "Human Rights: The United Nations and United States Foreign Policy" (1978) 19 *Harvard International Law Journa*l 813 – 816.

Newbery DM "Privatisation and Liberalisation of Network Utilities" (1997) 41 *European Economic Review* 357 - 383.

Nkonya LK "Realising the Human Right to Water in Tanzania" (2010) 17 *Human Rights Brief* 25 – 30.

Nickel JW "Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights" (2008) 4 *Human Rights Quarterly* 984 - 997.

Nomani Z "The Human Right to Environment in India: Legal Precepts and Judicial Doctrines in Critical Perspective" (2000) 5/2 *Asia Pacific Journal of Environmental Law* 113 - 134.

Oloka-Onyango J "Reinforcing Marginalised Rights in an Age of Globalisation: International Mechanisms, Non State Actors and the Struggle for Peoples

Rights in Africa America" (2002 – 2003) 18 *American University International Review* 815 – 913.

O'Neill O "The Dark Side of Human Rights" (2005) 81 *International Affairs* 427 – 439.

Overly MS "When Private Stakeholders Fail: Adapting Expropriation Challenges in Transnational Tribunals to New Governance Theories" (2010) 71 *Ohio State Law Journal* 341 - 380.

Pariotti E "International Soft Law, Human Rights and Non-State Actors: Towards the Accountability of Transnational Corporations?" (2009) 10 *Human Rights Review* 139 – 155.

Parker P "The New Right, State Ownership and Privatisation: A Critique" (1995) 8 *Economic and Industrial Democracy* 349 - 378.

Paust JJ "Human Rights Responsibilities of Private Corporations" (2002) 35 *Vanderbilt Journal of Transnational Law* 801 - 810.

Paust JJ "Non-State Actor Participation in International Law and the Pretense of Exclusion" (2011) 51 *Virginia Journal of International Law* 977 - 1004.

Pejan R "The Right to Water: The Road to Justiciability" (2004) 36 George *Washington International Law Review* 1181 – 1210.

Petrova V "At the Frontiers of the Rush for Blue Gold: Water Privatisation and the Human Right to Water" (2006) 31 *Brooklyn Journal of International Law* 557 – 596.

Polasek M "Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Introductory Note to Three Procedural Orders, ICSID Case No ARB/05/22" (2007) 22 *ICSID Review—Foreign Investment Law Journal* 149 - 154.

Prasad N "Privatisation of Water: A Historical Perspective" (2007) 3 *Law, Environment and Development Journal* 217 - 235.

Quinot G "Substantive Reasoning in Administrative-law Adjudication" (2010) 3 *Constitutional Court Review* 111 - 126.

Ratner SR "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 *Yale Law Journal* 443 – 545.

Rees JA "Regulation and Private Participation in the Water and Sanitation Sector" (1998) 22 *Natural Resources Forum* 95 - 105.

Robbins PT "Transnational Corporations and the Discourse of Water Privatization" (2003) 15 *Journal of International Development* 1073 – 1082.

Rubin SJ "Economic and Social Rights and the New International Economic Order" (1986) 1 *American University Journal of International Law and Policy* 67 - 96.

Roux T "Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court" (2003) 10 *Democratisation* 92 - 111.

Sachs A "The Judicial Enforcement of Socio-Economic Rights" (2003) 56 *Current Legal Problems* 579 - 601.

Scott CM "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International" (1998) 27 *Osggode Hall Law Journal* 769 – 878.

Scott C & Alston P "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise" (2000) 16 *South African Journal on Human Rights* 206 - 263.

Screiber W "Realising the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations" (2008) 48 *National Resources Journal* 431 – 478.

Shackleton JR "Privatisation: The Case Examined" (1984) *National Westminster Bank Quarterly Review* 59 – 73.

Shelton D "Protecting Human Rights in a Globalised World" (2002) 25 *Boston College International and Comparative Law Review* 273 - 286.

Smets H "The Right to Water as a Human Right" (2000) 30 *Environmental Policy and Law* 248 – 250.

Spronk S "Water and Sanitation Utilities in the Global South: Re-Centering the Debate on Efficiency" (2010) 42 *Review of Radical Political Economics* 156 - 169.

Spröte W "Negotiations on a United Nations Code of Conduct on Transnational Corporations" (1990) 33 *German Yearbook of International Law* 331 - 348.

Stone KVW "To the Yukon and Beyond: Local Laborers in a Global Labor Market" (1999) 3 *Journal of Small and Emerging Business Law* 93 - 130.

Tamanaha BZ "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 *Sydney Law Review* 375 - 411.

Teubner G "After Privatisation? The Many Autonomies of Private Law" (1998) 51 *Current Legal Problems* 393 - 424.

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 691 - 698.

Trindade AAC "The Interdependence of all Human Rights-Obstacles and Challenges" (2002) 50 *International Social Science Journal* 513 - 523.

Triponel A "Business and Human Rights Law: Diverging Trends in the United States and France" (2008) 23 *American University International Law Review* 855 - 913.

Tsemo S "Privatisation of Basic Services, Democracy and Human Rights" (2003) 4 *ESR Review* 2 - 4.

Tully S "A Human Right to Access Water? A Critique of General Comment No. 15" (2008) 26 *Netherlands Quarterly of Human Rights*" 35 - 63.

Turner L "Multinational Companies and the Third World" (1974) 30 *The World Today* 394 - 402.

Vandenhole W & Wielders T "Water as a Human Right-Water as an Essential Service: Does it Matter?" (2008) 26 *Netherlands Quarterly of Human Rights* 391 - 424.

Van Harten G "The Public-Private Distinction in the International Arbitration of Individual Claims against the State" (2007) 56 *International and Comparative law Quarterly* 371 – 394.

Vargas C & Nickson A "The Limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia (2002) 21 *Bulletin of Latin American Law* 99 - 107.

Vierdag EG "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights" (1978) 9 *Netherlands Yearbook of International Law* 69 – 103.

Visser JD, Cottle E & Mettler J "Realising the Right of Access to Water: Pipe Dream or Watershed" (2003) 7 *Law, Democracy and Development* 27 – 48.

Weissbrodt D & Kruger M "Norms on the Responsibilities of Transnational Corporations with regard to Human Rights" (2003) 97 *American Journal of International Law* 901 – 922.

Welch A "Obligations of State and Non-State Actors Regarding the Human Right to Water Under the South African Constitution" (2005) 5 *Sustainable Development Law & Policy* 58 - 64.

Wesson M "Grootboom and Beyond: Reassessing the Socio-Economic Rights Jurisprudence of the South African Constitutional Court" (2004) 20 *South African Journal of Human Rights* 284 - 308.

William M "Privatisation and the Human Right to Water: Challenges for the New Century" (2006 – 2007) 28 *Michigan Journal of International Law* 467 – 505.

Williams LA "The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study" 2010 (3) *Constitutional Court Review* 141 -186.

Winkler I "Judicial Enforcement of the Right to Water" (2008) 1 *Law, Social Justice & Global Development Journal* 1 - 10.

Yeshanew S "Combining the 'Minimum Core' and 'Reasonableness' Models of Reviewing Socio-Economic Rights" (2008) *9 ESR Review* 8 - 13.

Young KG "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 115 *Yale Journal of International Law* 113 -124.

Ziganshina D "Rethinking the Right to Water" (2008) 1 *Santa Clara Journal of International Law* 113 - 118.

Reports

Asia-Pacific Water Summit *Report of the Proceedings of the First Asia-Pacific Water Summit* (2007) <http://www.worldwatercouncil.org/fileadmin/wwc/Right> (accessed 06.10.2010).

COHRE Manual on Right to Water and Sanitation (2008) <http://www.cohre.org> (accessed 26.02.2010).

Donelly J *Human Rights and Dignity*: *Paper commissioned by and prepared for the Geneva Academy of International Humanitarian Law and Human Rights in the framework of the Swiss Initiative to commemorate the 60th Anniversary of the Universal Declaration of Human Rights* <http://www.udhr60.ch> (accessed 09.02.2011).

International Conference on Human Rights *Proclamation of Teheran: Final Act of the International Conference on Human Rights* (1968) UN Doc A/CONF.32/41.

International Commission of Jurists *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) <http://www.unhcr.org/refworld/docid/48> (accessed 26.02.2010).

International Council on Human Rights Policy *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002) <http://www.ichrp.org/files/reports/7/107_report_en.pdf> (accessed on 15.06.2011).

International Alert *Guidance for Extractive Industries* (2005) <http://www.international-alert.org/pdf> (accessed 26.06.2012).

International Finance Corporation *Performance Standards on Environmental and Social Sustainability* (2012) <http://www1.ifc.org/wps/wcm> (accessed 23.07.2012).

Kenan Institute for Ethics *The UN Guiding Principles on Business and Human Rights Analysis and Implementation* (2012) <http://kenan.ethics.duke.edu> (accessed 23.04.2012).

Nomogaia *A Methodology for Human Rights Impact Assessment* (2008) <http://www.nomogaia.org/HRIA/Entries/html> (accessed 26.06.2012).

Non-Aligned Movement *Final Document of the 14th Summit of Heads of States of the Non-Aligned Movement Egypt* (2009) <http://unispal.un.org/UNISPAL.NSF/> (accessed 06.20.2010).

Organisation on Economic Cooperation and Development Watch *10 Years on: Assessing the contribution of the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct* (2010) <http://oecdwatch.org> (accessed 23.05.2012).

Organisation on Economic Corporation and Development Watch *Quarterly Case Update* (2012) <http://www.oecdwatch.org/cases> (accessed 16.06.2012).

Public Citizen *Water Privatisation Fiascos: Broken Promises and Social Turmoil* (2003) <http://documents.foodandwaterwatch.org> (accessed 16.06.2011).

Rights and Democracy *Human Rights Impact Assessments for Foreign Investment Projects: Learning from Experiences in The Philippines, Tibet, the*

Democratic Republic of Congo, Argentina and Peru (2007) <http://www.dd-rd.ca/site/_PDF/publications/ 2007.pdf> (accessed 02.07.2012).

South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons *The Sarajevo Client Guidelines for the Procurement of Private Security Companies* (2006) <http://www.isn.ethz.ch/isn/> (accessed 16.07.2012).

United Nations Economic and Social Council *The Impact of Multinational Corporations on the Development Process and on International Relations*: *Report of the Group of Eminent Persons to Study the Role of Multinational Corporations in Development and in International Relations* (1974) UN Doc E/5500/Rev.1/Add1.

United Nations Water Conference *Mar del Plata Action Plan E/CONF.70/29* (1977).

United Nations Commission on Human Rights *The Right to Adequate Food as a Human Right: Report of the Special Rapporteur for the Right to Food* (1987) UN Doc E/CN.4/Sub.2/1987/23.

United Nations *Report of The UN Conference on Environment and Development* (1992) Rio de Janeiro UN Doc A/CONF.151/26/Rev.1

United Nations *Report of The Preparatory Committee on the Establishment of an International Criminal Court* (1998) UN Doc/A/Conf.183/2/Add.1 articles 23.5-23.6.

United Nations Commission on Human Rights *The UN Guiding Principles on Internal Displacement: Report of the Representative of the Secretary-General on Internally Displaced Persons* (1998) UN Doc E/CN.4/1998/53/Add.2.

United Nations Sub-Commission on the Promotion and Protection of Human Rights *Promotion of the Realisation of the Right to Drinking Water and Sanitation* (2000) UN Doc A/HRC/Sub.1/58/L.25.

United Nations Commission on Human Rights *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an adequate Standard of Living* (2002) UN Doc E/CN.4/2002/59.

United Nations Sub-Commission on the Promotion and Protection of Human Rights *The Relationship between the Enjoyment of Economic, Social, and Cultural Rights and the Promotion of the Realisation of the Right to Drinking Water Supply and Sanitation* (2002) UN Doc E/CN.4/Sub.2/2002/10.

United Nations Sub-Commission on the Promotion and Protection of Human Rights *Realisation of the Right to Drinking Water and Sanitation: Report of the Former Special Rapporteur* (2005) UN Doc E/CN.4/Sub.2/2005/25.

United Nations Development Programme Report *Beyond Scarcity: Power, Poverty and the Global Water Crisis* (2006) <http://hdr.undp.org/hdr2006/> (accessed 03.03.2010).

United Nations Education and Scientific Organisation *World Water Development Report*: *Water for People, Water for Life* (2006) <http://www.unesco.org> (accessed 04.02.2010).

United Nations Human Rights Council Business and Human Rights-Mapping *International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* (2007) A/HRC/4/035.

United Nations Committee on Economic, Social and Cultural Rights *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant* (2007) UN doc E/C.12/2007/1.

United Nations High Commissioner for Human Rights *Report on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation under International Human Rights Instruments (*2007) UN Doc A/HRC/6/3.

United Nations Human Rights Council *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe drinking Water and Sanitation, Catarina de Albuquerque* (2010) UN Doc A/HRC/15/31.

United Nations Global Compact Water Mandate *Policy on Communicating Progress* (2011) <http://www.unglobalcompact.org/docs.pdf> (accessed 27.06.2012).

United Nations High Commissioner For Human Rights *The Corporation Responsibility to Respect Human Rights: An Interpretive Guide* (2012) HR/PUB/12/02.

United Nations Office of the High Commissioner for Human Rights *Water Privatisation in The Philippines: Creating Inequity in People's Access to Sufficient and Potable Water* <http://www2.ohchr.org/water/pdf> (accessed 20.08.2011).

World Bank *Private Sector Development Strategy-Directions for the World Bank Group* (2002) <http://rru.worldbank.org/Documents/PapersLinks/699.pdf> (accessed 26.03.2010).

World Water Assessment Programme *The United Nations World Water Development Report Water in a Changing World* (2009) <http://www.unesco.org/water/> (accessed 23.09.2010).

World Health Organisation *Progress Report on Sanitation and Drinking Water-2010* <http://www.who.int/water_health/publications> (accessed 06.03.2010).

World Health Organisation *Guidelines for Drinking-Water Quality* (2011) <http://whqlibdoc.who.int/2011_eng.pdf> (accessed 22.08.2012).

Unpublished Papers and Theses

Action Aid *Turning off the Taps: Donor Conditionality and Water Privatisation in Dar se* Salaam (2004) <http://www.actionaid.org.uk/_content/documents.pdf> (accessed 13.06.2011).

Barrett SD "Privatisation in Ireland CESIFO" *Working Paper no1170* (2004) 15 <www.CESifo.de> (accessed 11.04.2011).

Bayliss K "Privatisation and Poverty: The Distributional Impact of Utility Privatisation Centre on Regulation and Competition" *Working Paper Series no16 (2002)* <http://www.idpm.man.ac.uk> (accessed 06.03.2010).

Beltrán EP *Water, Privatisation and Conflict: Women from the Cochabamba Valley* (2004) <http://www.boell.org> (accessed 16.06.2011).

Blake C "Normative Instruments in International Human Rights Law: Locating the General Comment" (2008) *Centre for Human Rights & Global Justice Working Paper No 17* <http://www.chrgj.org/publications/docs/wp/blake.pdf> (accessed 16.06.2010

Bonnardeaux D *The Cochabamba 'Water War': An Anti-Privatisation Poster Child?* (2009) <http://www.policynetwork.net> (accessed 17.06.2011).

Bull B, Jerve AM & Sigvaldsen E *The World Bank's and the IMF's use of Conditionality to Encourage Privatisation and Liberalisation* (2006) <http://www.regjeringen.no/upload/kilde/2006/0164/_conditionality_report.pdf > (accessed 11.03.2010).

Chng NR *Reconceptualising Regulation and the Global South* (2010) <http://regulation.upf.edu/dublin-10-papers/1G4.pdf> (accessed 17.06.2011).

Cruise T & Ramos C "Water and Privatisation: Doubtful Benefits, Concrete Threats" (2003) 98 *Social Watch Report: The Poor and the Market* available online at <http://www.philadelphia.edu.jo/Books> (accessed 17.06.2011).

Esguerra J *New Rules, New Roles: Does PSP Benefit the Poor? The Corporate Muddle of Manila's Water Concessions* (2003) <http://www.wateraid.org/pdf> (accessed 17.06.2011).

Grusky S & Fiil-Flynn M *Will the World Bank Back Down? Water Privatisation in a Climate of Global Protest* (2004) <http://www.worldbankwatch.org> (accessed 17.3.2010).

Guzman AT "International Soft Law" (2009) *UC Berkeley Public Law Research Paper No 1353444* <http://www.papers.ssrn.com/sol3/papers.cfm=1353444> (accessed 14.09.2010).

Hukka JJ & Katko TS *Water Privatisation Revisited: Panacea or Pancake?* (2003) <http://www.es.irc.nl/content/download/6672/100076/file/pdf> (accessed 23.07.2012).

Jeenes K & Steele L *The Eastern Cape Basic Services Delivery and Socio-Economic Trends Series: Providing Water and Sanitation* (2010) <http://www.fhiser.org.za/files/publications> (accessed 15.06.2011).

Khan I *Public vs Private Sector an Examination of Neo-Liberal Ideology: Managing the Privatisation Debate* Available <http://www.mpra.ub.uni-muenchen.de/13443/> (accessed 23.03.2010).

Knox JH *The Ruggie Rules: Applying Human Rights Law to Corporations* (2011) <http://www.ssrn.com/abstract=1916664> (accessed 23.04.2012).

Lopes PD *Water Privatisation and the Human Right to Water* (2006) <http://www.ces.uc.pt> (accessed 03.04.2010).

McGuigan C *The Impact of World Bank and IMF Conditionality: An Investigation into Electricity Privatisation in Nicaragua* <http://www.christianaid.org.uk> (accessed 11.04.2011).

McGraw GS *Defining and Defending the Human Right to Water and its Minimum Core: Legal and Construction of the Role of National Jurisprudence* (2010) <http://www.ssrn.com/abstract=1721029> (accessed 21.11.2011).

Morrison J, Schulte P & Schenck R *Corporate Water Accounting: An Analysis of Methods and Tools for Measuring Water Use and Its Impacts* (2010) <http://www.pacinst.org/reports/corporate_water_accounting_analysis/corp_water_accounting_exec_sum.pdf> (accessed 10. 04.2012).

Perez J *Sleeping Lions: International Investment Treaties, State-Investor Disputes and Access to Food, Land and Water* (2011) <http://www.oxfam.org> (accessed 08.06.2011).

Perry CJ *Water as an Economic Good: A Solution, or a Problem?* (1997) <http://www.irre.eng.k/Papers/report14.pdf> (accessed 23.04.2011).

Peterson LE & Gray KR *International Human Rights in Bilateral Investment Treaties and In Investment Treaty Arbitration*: *Research Paper prepared by the International Institute for Sustainable Development (IISD) for the Swiss Department of Foreign Affairs* <http://www.iisd.org> (accessed 05.06.2011).

Privatisation and Profit in Developing Countries *The La'o Hamutuk Bulletin* (2003) <http://www.etan.org> (accessed 05.06.2011).

Salman MA & Mclnerny-Lankford S *The Human Right to Water: Legal and Policy World Bank Publications* (2004) <http://www.worldbank.org> (accessed 26.02.2010).

Terence RL *Private Participation in the Provision of Water Service: The Water Page* <http://www.thewaterpage.com/ppp-debate1.htm> (accessed 03.30.2010).

Rodrik D *The New Global Economy and Developing Countries: Making Openness Work* (1999) <http://www.southcentre.org> (accessed 11.03.2010).

Rosemann N *The Human Right to Water under the Conditions of Trade Liberalisation and Privatisation: A Study on the Privatisation of Water Supply and Wastewater Disposal in Manila* <http://library.fes.de/pdf-files/iez/01949.pdf> (accessed 27.06.2011).

Ruh M *The Transition to Market Economics in Chile* <http://tiss.zdv.uni-tuebingen.de/webroot/sp/barrios/themeC1e.htm> (accessed 11.04.2011).

Water Aid *Why did City Water fail?: The Rise and Fall of Private Sector Participation in Dar es Salaam's Water Supply* (2008) <http://www.wateraid.org/documents/> (accessed 02.09.2011).

Whelan DJ *Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights* (2008) <http://www.econ.uconn.edu/working/7.pdf> (accessed 28.06.2010).

World Health Organisation *Cholera Country Profile: Zimbabwe* (2009) <http://www.who.int/cholera/Zimbabwe/pdf > (accessed 23.07.2010).

Wolf C *Manila Water- Privatisatising Regulated Services in a Developing Country: A Case Study* (2007) <http://ssrn.com/abstract=1133437> (accessed 15.06.2011).

Dissertations and Theses

Bulto TS *Rights, Wrongs and the River between: Extraterritorial Application of the Human Right to Water in Africa* (Unpublished LLD dissertation, University of Melbourne, 2011).

Chirwa DM *Towards Binding Economic, Social and Cultural Rights Obligations of Non State Actors in International and Domestic Law: A Critical Survey of Emerging Norms* (Unpublished LLD dissertation, University of Western Cape, 2005).

Mfuku N *Privatisation and Deregulation Policies in South Africa* (Unpublished LLM thesis, University of Western Cape, 2006).

Parmar P *Revisiting the Human Right to Water* (Unpublished LLM thesis, University of British Columbia, 2006).

Treaties and other Regional and International Instruments

Treaties

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) OEA/Ser LV/II.82 doc 6 rev1.

African Charter on Human and Peoples' Rights (1981) OAU Doc CAB/LEG/67/rev.5.

African Charter on the Rights and Welfare of the Child (1989) UN Doc A/44/49.

African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/LEG/24.9/49.

American Declaration of the Rights and Duties of Man (1948) OAS doc OE A/Ser L/V/II.65 Doc 6.

American Convention on Human Rights (1969) 1144 UNTS 123.

Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 222.

Convention on the Elimination of All Forms of Discrimination Against Women (1979) UN Doc A/34/46.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) UN Treaty Series1465/85.

Convention on the Rights of the Child (1989) UN Doc A/44/49.

Convention on the Law of the Non Navigational Uses of International Water Courses (1997) UN Doc A/51/869.

European Social Charter (1965) ETS No 5.

Geneva Convention Relative to the Treatment of Prisoners of War (1949) 75 UNTS 135.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287.

United Nations Human Rights Council *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011) UN Doc A/HRC/17/L.17/Rev.1.

International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316.

International Covenant on Civil and Political Rights (1966) UN Doc A/6316.

International Convention on the Elimination of All Forms of Racial Discrimination (1969) 660 UNTS 195.

International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (2006) UN Doc A/61/49.

Inter-American Convention to Prevent and Punish Torture (1985) OEA/Ser LV/II.82 doc 6 rev1.

Inter-American Convention on Forced Disappearance of Persons (1994) 33 ILM 1429.

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994) 33 ILM 1534.

Protocol to the American Convention on Human Rights on the Abolition of the Death Penalty (1990) OEA/Ser LV/II82 doc.6 rev.1.

Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) 1125.

Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes adopted in London (1999) UN Doc MP.WAT/2000/1.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2000) CAB/LEG/66.6.

Revised European Social Charter (1996) ETS No 35.

Rome Statute of the International Criminal Court adopted (1998) UN Doc A/CONF. 183/9.

Statute of the International Court of Justice (1945) 39 AJIL Supp. 215

Universal Declaration of Human Rights (1948) UN Doc A/810.

Vienna Convention on the Law of Treaties (1969) UN Doc A/Conf.39/27.

General Comments, Recommendations, Concluding Observations and Statements of Treaty Bodies

General Comments

Committee on Economic, Social and Cultural Rights *General Comment No 1 Reporting by States Parties* (1989) UN Doc E/1989/22.

Committee on Economic, Social and Cultural Rights *General Comment No 3 The Nature of States Parties' Obligations* (1990) UN Doc E/1991/23.

Committee on Economic, Social and Cultural Rights *General Comment No 4 The Right to Adequate Housing* (1991) UN Doc E/1992/3.

Committee on Economic, Social and Cultural Rights *General Comment No 5 on Persons with Disabilities* (1994) UN Doc E/1995/22.

Committee on Economic, Social and Cultural Rights *Human Rights Education and Public Information Activities Relating to the ICESCR* (1996) UN Doc E/1996/22.

Committee on Economic, Social and Cultural Rights *General Comment No 12 The Right to Adequate Food* (1999) UN Doc E/C.12/1999/5.

Committee on Economic, Social and Cultural Rights *General Comment No 13 The Right to Education* (1999) UN Doc E/C.12/1999/10.

Committee on Economic, Social and Cultural Rights *General Comment No 14 The Right to the Highest Attainable Standard of Health* (2000) UN Doc E/C.12/2000/4.

Committee on Economic, Social and Cultural Rights *Poverty and the International Covenant on Economic, Social and Cultural Rights* (2001) UN Doc E/C.12/2001/10.

Committee on Economic, Social and Cultural Rights, *General Comment No15 The Right to Water* (2002) UN Doc E/C.12/2002/11.

Committee on Economic, Social and Cultural Rights, *General Comment 16 The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights* (2005) UN Doc E/C.12/2005/3.

Committee on Economic, Social and Cultural Rights, *General Comment No 18 The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights* (2006) UN Doc E/C.12/GC/18.

Committee on Economic, Social and Cultural Rights *General Comment No 19 The Right to Social Security* (2008) *(art. 9)* UN Doc E/C.12/GC/19.

Committee on Economic, Social and Cultural Rights *An Evaluation of the Obligations to Take Steps to the Maximum of Available Resources under an Optional Protocol to the Covenant* (2007) UN Doc E/C.12/2007/1.

Human Rights Committee *General Comment No 6 The Right to Life* (1982*)* UN Doc HRI/GEN/1/Rev.1.

Human Rights Committee *General Comment No 27 Freedom of Movement* (1999) UN Doc CCPR/C/21/Rev.1/Add.9.

Committee on the Rights of the Child, *General Comment No 7 Implementing Child Rights in Early Childhood* (2005).

General Recommendations

Committee on the Elimination of all Forms of Discrimination Against Women *General Recommendation No 5* (1988) UN Doc A/43/38.

Committee on the Elimination of all Forms of Discrimination Against Women *General Recommendation No 19 on Violence against Women* (1992) UN Doc A/47/38.

Committee on the Elimination of Racial Discrimination *General Recommendation on the Rights of Indigenous Peoples* (1997) UN Doc A/52/18.

Committee on the Elimination of Racial Discrimination *General Recommendation No 27 on Discrimination Against the Roma* (2000) UN Doc. A/55/18, annex V.

Committee on the Elimination of Racial Discrimination *General Recommendation No 30 on Discrimination against Non-citizens* (2004) UN Doc CERD/C/64/Misc.11/rev.3

Committee on the Elimination of all Forms of Discrimination Against Women *General Recommendation No 26 on Women Migrant Workers* (2008) UN Doc CEDAW/C/2009/WP.1/R.

Committee on the Elimination of all Forms of Discrimination Against Women *General Recommendation No 28 on the Core Obligations of States Parties* (2010) UN Doc CEDAW/C/2010/47/GC.2.

Committee on the Elimination of Racial Discrimination *General Recommendation XX on Article 5 of the* Convention (1996) UN Doc A/51/18 (1996).

Concluding Observations

Committee on Economic, Social and Cultural Rights *Concluding Observations on Panama* (2001) UN Doc E/C.12/1/Add.64.

Committee on the Elimination of Racial Discrimination *Concluding Observations on Malawi* (2003) UN Doc A/58/18.

Committee on the Elimination of Racial Discrimination *Concluding Observations on Suriname* (2004) UN Doc A/59/18.

Committee on the Elimination of Racial Discrimination *Concluding Observations on Nepal* (2004) UN Doc CERD/C/64/CO/5.

Committee on the Elimination of Racial Discrimination *Concluding Observations on Slovakia* (2004) UN Doc CERD/C/65/CO/7.

Committee on the Elimination of Racial Discrimination *Concluding Observations on Australia* (2005) UN Doc A/60/18.

Committee on the Elimination of Racial Discrimination *Concluding Observations of CERD on the Czech Republic* (2005) UN Doc A/58/18.

Committee on Economic, Social and Cultural Rights *Concluding Observations on* Serbia (2005) UN Doc E/C.12/1/Add.108.

Committee on the Elimination of Racial Discrimination *Concluding Observations on the United States of America* (2005) UN Doc A/56/18.

Committee on Racial Discrimination *Concluding Observations on France* (2005) UN Doc A/60/18.

Committee on the Elimination of Racial Discrimination *Concluding Observations on Slovakia* (2005) UN Doc A/59/18.

Committee on Economic, Social and Cultural Rights *Concluding Observations on Mexico* (2006) UN Doc E/C.12/MEX/CO/4.

Committee on the Elimination of Racial Discrimination *Concluding Observations on Lithuania* (2006) UN Doc CERD/C/LTU/CO/3.

Committee on the Elimination of Racial Discrimination *Concluding Observations on Israel* (2007) UN Doc CERD/C/ISR/CO/13.

Resolutions

United Nations General Assembly Resolution 32/330 (1977) UN Doc A/RES/32/130.

United Nations General Assembly Resolution 40/441(1985) UN Doc A/RES/40/114.

United Nations General Assembly Resolution 41/117 (1986) UN Doc A/RES/41/117.

United Nations General Assembly Resolution 43/113 (1988) UN Doc A/RES/43/113.

United Nations General Assembly Resolution 54/175 (2000) UN Doc A/RES/54/175.

United Nations General Assembly *Resolution 64/292 on the Human Right to Water and Sanitation* (2010) UN DocA/64/L 63/Rev 1.

United Nations Human Rights Council Resolution (2008) UN doc A/HRC/7/22.

Declarations, principles and rules

Charter of the International Military Tribunal (Nuremberg Charter) (1945) <http://www.cfr.org/human-rights/charter-international> (accessed 16.02.2012).

Communication from the European Commission to the European Council, the European Parliament and the European Economic and Social Committee COM (2002)<http://www.enpi-info.eu/enpidoc/content/commission-communication-participation-non-state-actors-eu-dvelopment-policy> (accessed 16.02.2012).

Cotonou Agreement between the EU and Africa, Caribbean and Pacific States (2000) <http://www.bilaterals.org/IMG/pdf/Cotonou_1_body_-2.pdf> (accessed 16.02.2012).

Equator Principles <http://www.equator-principles.com/index.php/about-the-equator-principles> (accessed 23.06.12).

Forestry Stewardship Council Principles and Criteria for Forest Stewardship <http://www.fsc.org/principles-and-criteria.34.htm> (accessed 23.06.2012).

International Labour Organisation *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (2006) <http://www.ilo.org/wcmsp5/> (accessed 15.04.2012).

Kimberly Process Certification Scheme <http://www.kimberleyprocess.com/docum> (accessed 28.07.2012).

United Nations *Stockholm Declaration of the UN Conference on Human Environment* (1972) UN Doc A/Conf. 48/8.

United Nations *Proclamation of the International Drinking Water and Sanitation Decade* (1980) UN Doc A/RES/35/18.

United Nations *Declaration on the Right to Development* (1986) GA/res 41/128 UN Doc A/41/53

United Nations Commission on Human Rights *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1987) UN Doc E/CN.4/1987/17.

United Nations Principles for Older Persons (1991) UN DocA/RES/46/91

United Nations *Millennium Declaration* (2000) UN Doc A/RES/55/2.

United Nations *Johannesburg Plan of Implementation of the World Summit on Sustainable Development* (2002) UN Doc A/CONF.199/20.

United Nations Sub-Commission on the Promotion and Protection of Human Rights *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* (2003) UN Doc E/CN.4/Sub.2/2003/12Rev.2.

United Nations *Declaration on the Rights of Indigenous People* (2007) UN Doc A/RES/47/1.

Constitutions and national legislation

Australia

The Utilities Act Chapter 27 of 2000.

Belarus

Council of Ministers Decision On Measures for the Establishment of a System of State Social Service Standards for the Population of the Republic No 724, 2003.

Bolivia

Constitution of Bolivia, 2009.

Botswana

Constitution of Botswana,1966.

Brazil

Basic Water and Sanitation Law 11 445 of 2007.

Burkina Faso

Decree No 2004-580/PRES/PM/MAHRH/MFB Governing Domestic Water Uses, 2004.

Chile

Law 18778, Establishing a Subsidy for Payment for the Use of Drinking Water and Sewerage Services,1989.

Columbia

Constitution of Colombia, 1991.

Law 142 Establishing the Regime for Public Household Services of 11 July 1994.

Costa Rica

Law on the Regulating Authority for Public Services, Law 7593 of 9 August 1996.

Guyana

Public Utilities Commission Act No 10 of 1999.

Honduras

Decree No 118-2003, Framework Law for the Drinking Water and Sanitation Sector of 2003.

India

Constitution of India, 1949.

Indonesia

Government Regulation No 16 Regarding Development of Drinking Water Supply Systems and Sanitation of 2005.

Kenya

Constitution of Kenya, 2010.

Kyrgyz Republic

Water Code of the Kyrgyz Republic, Law No 8 of 12 January 2005.

Lesotho

Water Act No 15 of 2008.

Madagascar

Water Code, Law No 98-029 of 999.

Malaysia

Water Services Industry Act No 655 of 2006.

Namibia

Water Resources Management Act No 24 of 2004.

Netherlands

Drinking Water Law of 19 July 2009.

New Zealand

Local Government Act No 84 of 20

Nicaragua

General Law on Drinking Water and Sanitation Services, Law No 297 of 2 July 1998.

General Law on National Water Resources of 15 May 2007.

Paraguay

Law 3239 on Water Resources of 10 July 1997.

Tariff Regulations for Licensees with respect to Law No 1614/2000.

Republic of South Africa

Constitution of the Republic of South Africa,1996.

Water Services Act No 108 of 1997.

Government Gazette No 22355, Notice R509 of 2001 of 8 June 2001.

Local Government: Municipal Systems Act No 32 of 2000.

Republic of Uruguay

Constitution of the Republic of Uruguay, 1967.

Tanzania

Energy and Utilities and Regulatory Authority Act No 11 of 2001.

United Kingdom

Water Industry Act Chapter 56 of 1991.

USA

California Public Utilities Code of 1993.

Table of Cases

International Court of Justice

Anglo-Norwegian Fisheries Case (United Kingdom v Norway) (1951) ICJ Reports 116-375.

Asylum Case (Colombia v Peru) (1950) ICJ Reports 266.

Guinea Bissau v Senegal (1989) ICJ Reports 69.

Nicaragua v USA (Merits) (1986) ICJ Reports 97.

SS Lotus (France v Turkey) (1927) PCIJ (Series A) No 10/1.

International Centre for the Settlement of Investment Disputes

Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania (2008) ICSID Case no ARB/05/22.

European Court of Human Rights

Airey v Ireland (1979) 2 EHRR 305.

Stec v UK Admissibility decision (2005) 41 EHRR SE 18.

Dulas v Turkey, Application no 25801/94 Judgement of 30 January 2001.

European Committee of Social Rights

AT v Hungary Communication no 2/2003 (Decision on the merits, 26 January 2005).

Autisme Europe v France Complaint no 13/2002 (Decision on the merits, 4 November 2003).

Defence for Children International v The Netherlands Complaint no 47/2008 (Decision on the merits, 20 October 2009).

International Commission of Jurists v Portugal Complaint No 1/1998 (Decision of 9 December 1999).

European Roma Rights Centre v Bulgaria Complaint no 31/2005 (Decision on the merits of 18 October 2006).

European Roma Rights Centre v Italy Complaint no 27/2004 (Decision on the merits of 29 June 2004).

European Roma Rights Centre v Greece Complaint no 15/2003 (Decision of 8 December 2004).

European Federation of National Organisations working with the Homeless (FEANTSA) v France Complaint no 39/2006 (Decision on the merits 5 December 2007).

International Association Autism Europe (IAAE) v France Complaint no 13/2002 (Decision on the merits of 4 November 2003).

Inter-American Court and Commission on Human Rights

Case of Children's Rehabilitation v Paraguay Judgement of 2 September 2004, Inter American Court of Human Rights (Ser.C).

Case of Pueblo Bello Massacre v Colombia Inter-Am Ct HR (ser C) No 140 (31 January 2006).

Maya Indigenous Community of the Toledo District v Belize (2004), Case 12.053, Inter-Am CtHR OEA/Ser L/V/II.122 Doc 5 rev.

Legal Status and Human Rights of the Child Advisory Opinion OC-17/02 28 August 2002 by Inter-American Court of Human Rights (Ser A) no 17.

Velasquez Rodriguez v Honduras Judgement of July 29 (1988) Inter-Am CtHR (Ser C) no 4.

Yakye Axa Indigenous Community v Paraguay Judgement of June 17 (2005) Inter-Am CtHR (Ser C) no 125.

African Commission on Human and People's Rights

Centre on Housing Rights and Evictions (COHRE) v Sudan Communication 296 (2005).

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Communication no 276 (2003).

Free Legal Assistance Group and others v Zaire Communications 25/89, 47/90, 56/91 and 100/93 (Decision made at the 18th Ordinary Session, October 1995).

Purohit and Moore v The Gambia Communication no 241/2001 (2003).

Social and Economic Rights Action Centre (SERAC) and Another v Nigeria Communication no 155/96 (2001).

Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudan communications no 279/03 & 296/05 (2005).

Domestic Cases

Australia

Dagi v Broken Hill Proprietary Company Limited (No 2) [1997] 1 VR 428.

Botswana

Mosetlhanyane and others v Attorney General of Botswana Civil Appeal No CACLB-*074*.

Sesana and Others v Attorney-General [2006] AHRLR 183.

India

FK Hussain v Union of India AIR (1990) Ker 321.

Francis Coralie Mullin v Adm'r Union Territory of Delhi (1981) 2 SCR 516.

Vellore Citizens' Welfare Forum v Union of India (1996) 5 SCC 647.

Narmada Bachao Andolan v Union of India AIR 2000 SC 3751; 248 (2000) 10 SCC 664.

Unni Krishnan JP v State of AP and Others (1993) SCR (1).

Perumatty Grama Panchayat v State of Kerala (2004) 1 KLT 731.

S K Garg v State of Uttar Pradesh and Others (1999) AIR All 41.

Subhash Kumar v State of Bihar and Others (1991) AIR 420.

Republic of South Africa

Aventis Pharma SA v Cipla Life Sciences and Treatment Action Campaign as amicus curiae 2012 ZASCA 108.

Balolo and Others v University of Bophuthatswana and Others 1995 4 SA 230 (B).

City of Johannesburg and Others v Mazibuko and Others (Centre on Housing Rights and Evictions as amicus curiae) (2009) 3 SA 592 (SCA).

Electoral Commission v Langeberg Municipality 2001 3 SA 925 (CC).

Government of the Republic of South Africa and Others v Grootboom and Others 2001 1 SA 46 (CC).

Inkatha Freedom Party and Another v Truth and Reconciliation Commission and others 2000 3 SA 119 (C).

Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development 2004 6 SA 505 (CC).

Manqele v Durban Transitional Metropolitan Council 2002 6 SA 423 (D).

Mazibuko and Others v City of Johannesburg (Centre on Housing Rights and Evictions as amicus curiae) 2008 (4) All SA 471 (W).

City of Johannesburg and Others v Mazibuko and Others (Centre on Housing Rights and Evictions as amicus curiae) 2009 3 SA 592 (SCA).

Mazibuko and Others v City of Johannesburg and Others 2010 4 SA 1 (CC).

Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 5 SA 721 (CC).

Nkonkobe Municipality v Water Services SA (Pty) Ltd 2001 3 ZAECHC.

Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others 2010 4 BCLR 312 (CC).

Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others 2008 3 SA 208 (CC).

Residents of Bon Vista Mansions v Southern Metropolitan Local Council 2002 6 BCLR 625 (W).

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another as Amici Curiae) 2010 3 SA 454 (CC).

Soobramoney v Minister of Health (Kwazulu-Natal) 1998 1 SA 765 (CC).

UK

Lubbe and others v Cape Plc 2000 1 WLR1545.

R v Director General of Water Services Ex parte Lancashire CC 1999 Env LH 114.

USA

John Doe et al v UNOCAL Corporation 395 F.3d 932 (9 Cir. 2002).

Sequihua v Texaco 847 F Supp 61 (1994).

Wiwa v Royal Dutch Petroleum 101 cert den'd 532 US (2001).

Wiwa and others v Royal Dutch Petroleum and others (SDNY) (No 96 Civ. 8386).